Case No. 03-3941

BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NEIL LEWIS,

Appellant,

vs.

ROBERTS DAIRY CO.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

The Honorable Richard Kopf, District Court Judge

APPELLANT'S BRIEF ON APPEAL

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The plaintiff was fired from his job with the defendant after working for seventeen years, ultimately as manager of the pedal department which delivered dairy products to grocery stores and other customers. The plaintiff alleged that his health problems related to cancer and his age motivated the termination. The plaintiff tried his age discrimination and American's with Disabilities Act case to a jury of seven members in June of 2003. After three days of jury deliberations, the trial judge declared a mistrial due to the jury's failure to reach a verdict. Rather than retry the matter, the parties stipulated in August of 2003 that the trial court decide the matter upon the existing record, and all rights of appeal would be preserved. The trial Court entered judgment in favor of the defendant and dismissed both of plaintiff's causes of action. The plaintiff filed this appeal seeking a reversal of the judgment.

The plaintiff hereby requests oral argument of this appeal. This appeal is based on an erroneous determination of the facts, and deals with an extensive record. Oral argument will assist in narrowing down the specific facts that support the Appellant's argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES

STATUTES AND REGULATIONS

JURISDICTIONAL STATEMENT AND STANDARD OF REVIEW

The District Court had subject matter jurisdiction of this case tried under two Federal Statutes: the ADA and the ADEA.. Under those statutes the Appellant has a right to appeal to the Court of Appeals. The District Court decision was rendered on November, 18, 2003 and the Notice of appeal was timely filed on December 4, 2003. As to the fact determination the standard of review is whether the trial court was clearly erroneous. As to the construction of the ADA the standard of review is an abuse of discretion.

STATEMENT OF THE ISSUES

I.

Whether the Trial Court's ruling that the plaintiff did not meet his burden of proof under the ADA was clearly erroneous.

II.

Whether the Trial Court's ruling that the plaintiff did not suffer a disability as defined under the ADA was clearly erroneous.

iv.

III.

Whether the Trial Court’s ruling that the plaintiff did not meet his burden of proving that his disability was a factor in the decsion to fire h im was clearly erroneous.

IV.

Whether the Trial Court abused its discretion in failing to admit Exhibit 32 into evidence

V.

Whether the following findings of fact were clearly erroneous:

18. Tom Fredrickson was aware that Plaintiff's voice was gruff, but was unfamiliar with the specifics of his health."

Plaintiff’s throat impairment never affected his job performance” and 24. “Plaintiff's voice caused him no problems whatsoever doing his job at Robert's dairy.”

27. Despite the fact that Plaintiff claims Wiley could not drive, he admits that they drove halfway to Sioux City and back down 1-29 to Omaha.

55. Stevens was removed form the Bag ‘N Save account in July 2001

STATEMENT OF THE CASE

The plaintiff tried his age discrimination and American's with Disabilities Act case to a jury of seven members in June of 2003. After three days of jury deliberations, the trial judge declared a mistrial due to the jury's failure to reach a verdict. Rather than retry the matter, the parties stipulated in August of 2003 that the trial court decide the matter upon the existing record, and all rights of appeal would be preserved. The trial Court entered judgment in favor of the defendant and dismissed both of plaintiff's causes of action. The plaintiff filed this appeal seeking a reversal of the judgment.

SUMMARY OF THE ARGUMENTS

The appellant is essentially challenging the conclusions of fact that led the Court to rule there was no violation of the ADA nor ADEA. The arguments outline the facts in the record that establish the plaintiff did have health complications that generate ADA protection and the facts that showed age and health were concerns in terminating his job. Much of the brief is an analysis of the facts that proved the employer's reason for the termination made no sense and was pretextual.

STATEMENT OF FACTS

Neil Lewis' job was terminated by a new management crew that began working for Roberts Dairy in the Fall of 2000. Jeff Powell became the new CEO. At the time John Viale began working for Roberts Dairy as plant manager in Omaha in March of 2001, Neil Lewis had worked for Roberts Dairy for a total of 17 years and had been the Wholesale Manager over the route drivers since November of 1995. (#1 Uncontroverted facts of Order on Pretrial Conference).

Lewis's duties were to supervise the pedal route drivers who delivered milk to the smaller accounts. The duties of the pedal route drivers included reviewing the pallets of milk being loaded to make sure the deliveries had adequate inventory to meet the customers' needs, unloading product at the grocery stores, and making sure that the product had adequate dates longer than 10 days from delivery, picking up empties from the stores and picking up leaking containers. (T. 63:2–65:5 & 214:1-14).

When he came on board in March 2001, Viale concluded that Lewis headed a well run department. (T. 394:15-19 & 461:2-5). Lewis was very dedicated to the company, he worked very hard, put in a lot of time, he was always available and he was more dependable than other managers. (T. 39:1-7 & 40: 10-18). Viale thought Lewis had great rapport with customers and the company profited from his

efforts (T. 605:6-9). During the entire time Viale and Lewis worked together Viale testified no issues arose indicating a problem with Lewis's performance. (T. 395:2-6). The drivers Lewis supervised respected him (T. 256:19-21). Neil Lewis supervised a staff of 33 Teamsters Union members, and had never been the subject matter of a grievance throughout the entire time he served as a department head. (T. 514:23-515:2). He was also good about assisting other departments (T. 647:15-20).

Lewis's dedication to the company was not questioned by anyone. Indeed, when he had a heart attack in 1997, he returned to his duties so early that it gave the safety manager concern about his health. (T. 43:24-44:8) Following cancer surgery he returned to work with a feeding tube in his nose. (T. 55:8-21).

Neil Lewis suffered from squamous cell carcinoma of the epiglottis which necessitated a supraglottic laryngectomy, right supraomohyoid neck dissection and tracheaostomy on November 3, 1992. (Ex. 5). As Lewis described it, the epiglottis is the flap that covers the air tube and the tube going to the stomach. Without the flap Lewis had to relearn how to eat and drink to avoid suffocation. It is now necessary to exhale air instead of swallowing while drinking. (T. 56:10-57:13). Dr. Iris Moore's description of Lewis condition indicated at the time of the termination of his employment Lewis still had significant problems with swallowing, talking and breathing. (Ex. 5).

Viale had little contact with Lewis until June of 2001 as he spent his first months at Roberts in training. (T. 569:1-12). In June of 2001 Viale testified that he had his most extended conversation with Lewis when he rode in a vehicle with Lewis. (T. 402:21-23 & 90:7-14). During the drive Viale admits questioning Lewis about his voice, (T. 402:17-20). Lewis reports Viale told him that given his age and the quality of his voice, he needed to find something else to do. (T. 75:17-80:14). Viale testified that within four to six weeks of that conversation he had a conversation with Tom Fredrickson, the personnel director wherein Fredrickson told him that age and disability wouldn't prevent them from firing someone for lying, (T. 398:5-8). Within 2 days of that conversation Viale undertook the effort to see if he could catch Lewis in a lie, (T. 403:14-17) and he began a letter to fire Lewis for lying even though he hadn't finished his investigation regarding whether Lewis was truthful. (T. 403:13-404:9).

Viale followed up his first conversation in the vehicle with Lewis by asking him if he had thought more about what he had told him about retiring or finding another job. When Lewis made no indication he intended to leave the company, Viale told Lewis that he would retire him, (T. 81:12-23).

Lewis attempted to stay out of Viale's way. (T. 85:24). In each of the three conversations Viale had with Lewis before he fired him, he referred to Lewis's voice and age. (T. 85:9-24). On occasion Viale made comments to Dave Stovie,

who next to Lewis was the second oldest key manager, (T. 394:12-14), asking Stovie what was wrong with Lewis' voice as he had a hard time understanding Lewis when he spoke (T. 255:13-24) and on more than one occasion he asked Stovie the ages of Lewis and Stovie. (T. 252:24-253:16).

In December of 2000 the employees put in requests for vacation leave for the coming year, and Neil Lewis's procedure for dealing with requests was to let employees know in December if there was a particular week that was over-requested because of the chance that someone's vacation would have to be denied if the dairy was short-handed. (T. 95:11-96:20)

The July 4, 2001 weekend was one that was requested by several drivers, and Neil Lewis told everyone it was a popularly requested week for vacations, and that if anybody wanted to make sure they didn't lose out, they might want to choose another week. However, Lewis at all times remained willing to provide the week off to anyone who requested it, if possible. (T. 95:11-96:20).

Darin Stevens, who originally had requested the 4th week off, changed vacation plans in light of Lewis's statement. (T. 95:11-96:20) Darin Stevens had been one of Lewis's drivers for some time, and the two had socialized together. (T. 90:15-20). Stevens would come over to Lewis's house, especially when he was going through troubled times at home, and Stevens considered Lewis as a friend, and someone who would go to bat for him. (T. 201:18-202:1).

When Stevens' job had been on the line in the past at Roberts Dairy, Lewis had gone to bat for him, and Stevens was aware that Lewis had been responsible for him holding onto his job. (T. 201:18-202:1). Stevens consumes alcohol on a daily basis, and had consumed a case of beer during the weekend prior to the Monday morning in which the Plaintiff took Stevens' deposition. (T. 203:2-8).

The Plaintiff had, through the years, heard from Stevens with evening phone calls, especially when Stevens had consumed alcohol to the point of intoxication. (T. 90:1-15). Lewis had observed Stevens at times having a slurred voice on the phone, and he would tend to be more aggressive when drinking. (T. 91:7-10).

On June 20, 2001 Stevens called Lewis complaining that he was upset he did not get the week of July 4th off, when a less senior employee would be off. (T. 971:2 & 97:8-16). Lewis explained to Stevens in that conversation that he could still have the 4th week off, as they were well staffed now, and the only reason Stevens didn't have it off is he changed his plans back in December when Lewis warned of a possible labor shortage on the 4th of July. (T. 95:14-97:16). Stevens kept Lewis on the phone for some time. (T. 97:8-16). Lewis observed Stevens to show signs of being intoxicated in that conversation. (T. 97:1-2). Stevens made a note of his version of the phone call on June 20, 2001, and he admits that Lewis told him he could have the 4th of July off (Ex. 3). Lewis then gave Stevens a note telling him to decide on vacation dates (Ex. 24).

Stevens took the note (Ex. 24) Lewis wrote stating that he needed to decide his vacation dates to the Union President, Kim Quick, and Mr. Quick made an appointment with Tom Fredrickson and John Viale to discuss the matter of Lewis's note. (T. 509:15-18). The meeting was held on July 20, 2001 (T. 351:3-6) and Stevens did nothing but read his note (Ex. 3) to Viale. (T. 247:4-8) Viale's response was "thank you for bringing this matter to my attention**.**" (T. 217:5-7). The only issue Stevens ever had with Lewis was the dispute about the vacation (T. 249:1-3). In fact Stevens got along better with Lewis than his previous supervisor because he could work things out with Lewis. (T. 216:8-16).

Viale approached Lewis on July 21st or 22nd 2001 (T. 410:19-22 & 433:21-434:2) and asked about whether Darin Stevens had performance problems and Lewis responded that there were complaints about Stevens. the most recent he recalled had been Bag 'N Save and Bergan Mercy and Lewis was thinking about removing Bag 'N Save from Steven's route when the routes were restructured in the Fall. (T. 100:17-23 & 433:21-434:2). That's the first time the issue of Bag 'N Save came up:

> Q. There was also nothing in that letter about Bag 'N Save is there?
> A. No.
> Q. That to you was raised later when you asked Lewis how is Stevens' performance? He said he got complaints from Bag 'N Save, got complaints from Bergan?
> A. It was when I approached Mr. Lewis on not following our bargaining policy in terms of vacation.

(T. 425:8-15).

Viale's initial reaction when Lewis told him of Stevens performance problems was that he was sure Lewis was being truthful about Stevens because the things Lewis said he'd heard about Stevens were typical of the complaints received against all drivers. (T. 410:15-18).

His changed his mind about Lewis being truthful after a conversation on July 27, 2001 with Tom Frederickson, the human resources director about the impact of the ADA and the ADEA. Frederickson told Viale that "age and health have no impact on terminating an employee for lying." (T. 399:1-19). At that time the only affirmative, statement Lewis made to Viale was that Stevens had problems with service (T. 469:12-21) at Bag 'N Save and he was thinking of changing routes. Viale then had John Dagerman question Bag N Save employees on July 30, 2001 (Ex. 18 & 19) in an effort to find out if Lewis lied about Steven's job performance. (T. 585:11-14).

Viale first began a termination letter dated July 29, 2001 (Ex. 23) before checking with Bag 'N Save, however by that time he had tracked down the person Lewis said he talked to and that person did indicate he had problems with Stevens. (T. 465:5-13). In the first termination letter Viale indicates that Lewis hadn't followed the contract regarding vacations, and stated he didn't care about the contract. However, the conclusion was at odds with Stevens' handwritten note of

June 20, 2001 in which he admits that Lewis told him he could still have the July 4th week off, and at odds with Lewis's letter to Stevens of June 20, 2001 in which Stevens was told he can have July 4th off, but that he needed to make up his mind. (Ex. 24). Viale took the allegation about improperly denying the vacation out of the termination letter because he decided they couldn't prove that in light of Lewis' handwritten statement that Stevens could have the vacation time. (T. 412:10-413:3).

Stevens had a long history of complaints about his work and admits to receiving about four complaints a year. (T. 92:7-94:5 206:10-21, Ex. 1, 2, 5). In fact, the note that Stevens read during the meeting with Viale that he authored on June 20, 2001 stated that when he does get complaints about his work, Lewis takes him aside and tells him about it by calling him on his cell phone. (Ex. 3). The Bag N Save notes sought by Dagerman on July 30, 2003 indicated several negative aspects of Stevens work and Stevens admitted those were performance complaints from Bag N Save about his work on July 30, 2001 (T. 212:22-213:4).

In order to prove that Stevens was not the subject of complaints, Viale on July 30, 2001 had questionnaires presented to Bag N Save staff about Darin Stevens. The staff indicated that Stevens had problems with bringing short coded products that were about to expire, with bringing short deliveries with not enough product, and that he failed to take returns, all of which were part of Stevens' job. (T. 212:22-213:4). On July 29, 2001 when Viale began a termination letter he had

never seen the reports of the questionnaires from Bag N Save as they were not sought until July 30, 2001. Darin Stevens' personnel file showed ongoing complaints about his performance through the years, and on several occasions he was told that his job was in jeopardy if he did not perform his duties and exhibit a better attitude. (T. E 1, 2, 6, 15). Had the issue really been about Lewis' truthfulness about complaints against Stevens, Viale knew that he could check Stevens' work records to verify whether Lewis was right about complaints about his performance, but he chose not to do that. (T. 411:2-18).

Robert Kimball, the Bag N Save store manager, testified that Darin Stevens was the route driver for the Bag N Save on July 31, 2001 when Neil Lewis's termination letter was undertaken by John Viale. When the Bag N Save reports came back indicating problems with Darin Stevens' job performance, Viale went ahead and completed the termination letter of Lewis and told Tom Fredrickson he wanted to fire Lewis for lying about Darin Stevens' job performance. (T. 286:25-287:8).

When Viale told Frederickson he intended to fire Lewis for lying, (T. 291:22-292:2), Frederickson then contacted Jeff Powell by phone and a conference call was held in which Powell told Viale it was up to him to decide what to do, but that if he fired Lewis he needed to refer to the letter Powell had given Lewis in March, 2001. Tom Frederickson had forgotten about that letter until Powell

mentioned it and refreshed his recollection about the letter, and Viale did not know about the letter. (T. 303:11-15 & 304:19-305:9).

Dave Stovie and Neil Lewis were approximately the same age, and the two oldest department managers at Roberts Dairy at the time Viale was hired. (T. 394:12-14). Both Lewis and Stovie perceived a difference in the manner in which they were treated by Viale as compared to younger managers beginning in June of 2001. (T. 266:11 & 28:22-85:5).

Viale was heard stating that he could set people up and fire them in more ways than one. (T. 275:3-8). When Stovie heard a rumor of a plan to fire he and Lewis, he approached Viale in May 2001. Viale told him that it was a misunderstanding, what he had said was "if I fire Neil Lewis, Dave Stovie will quit you don't have to worry about him." (T. 258:23-259:5). Viale never denied making that statement. In May 2001 Viale knew virtually nothing about Lewis other than the fact he had a hard time understanding him when he talked and that he was over 55. (T. 255:13-25 & 253:9-10 & 569:1-12).

Viale encouraged both Stovie and Lewis to find work elsewhere. (T. 265:23-24 & 80:13-14). When neither did, Viale fired Lewis on August 1, 2001 and fired Stovie approximately five months later (T. 264:5-20). Viale rubbed his hands together while announcing to Stovie that he was eliminating his position and giving it to another employee. (T. 264:17-265:3). The termination of Lewis and Stovie

eliminated the two oldest department heads working under Viale. (T. 253:24-254:2). Plaintiff's duties were taken over by a younger individual, (T. 136:16-22) and Dave Stovie's duties were given to a younger individual when his job was terminated (T. 274:16-21) .

In March, 2001, Tom Fredrickson, Personnel Director, approached Lewis and spoke to him about seeking disability retirement, something Lewis said he was not interested in doing. (T. 75:3-15). Roberts personnel also approached Dave Stovie encouraging him to seek disability retirement. (T. 265:9-13).

Jeff Powell had taken over as C.E.O. in the fall of 2000 with a policy that all past transgressions would be forgiven, and all employees would begin with a clean slate. (T. 564:9-19) Despite that fact, in March, 2001, Powell gave a letter to Lewis (Ex. 128), disciplining him for nonspecified actions he had supposedly taken in 1997 that led to a race discrimination suit being filed by Penoral Wiley. The Wiley matter was settled in March of 2001. Lewis at all times denied knowing what he had done that was alleged to be wrong with the hiring process in the Wiley matter, (T. 75:2-4) and the company was unable to provide specifics at trial as to what Lewis had allegedly done in the Wiley hiring matter that would violate any company procedures or give rise to discipline. (T. 579:3-581:14).

When Jeff Powell began with the company in the Fall of 2000 he was told that Roberts Dairy couldn't run the pedal department without Lewis. (T. 566:1-2).

Powell had told Viale when Viale began working that Lewis's department in March of 2001 that Lewis's department was very well run. (T. 394:19-395:1). Despite that fact there was a note placed by Powell in Lewis's employment file in March 2001 that stated "can't work 10 years" and "fire him Friday" (E. 21 2nd page & T. 484:19-23& 482:22-483:5). The placement of the note in Lewis's file came before Viale was hired at the end of March 2001. (T. 569:1-12). The note was also placed after Lewis failed to act on Fredrickson's request that Lewis get disability and quit his job. (T. 128:3-15).

Viale did not give Lewis the initial termination letter he had written beginning July 29, 2001, but instead gave him a two paragraph termination letter stating he was being fired for lying about Darin Stevens' job performance and because of the March, 2001 reprimand letter. (Ex. 25) However, Viale testified that the March 2001 reprimand letter from Powell regarding the Penoral Wiley matter had nothing to do with his decision to terminate Neil Lewis. (T. 443:19-21) in fact he made the decision to terminate Lewis without knowing about the March 7, 2001 letter. (T. 303:11-15).

Viale testified that he manages by committee, but didn't put his committee of managers together until after he had fired Lewis and Stovie (T. 393:16-23). Viale treated the younger managers differently than Lewis. He did not allow Lewis to attend staff meetings (T. 84:1-3). He changed his office into a driver's meeting

room (T. 84:15-21). He gave deference to the younger managers, but not Lewis and Stovie. (T. 84:22-85:5).

Other managers had grievances filed against them; Neil Lewis was never the subject of a grievance (T. 98:18-25). The initial termination letter which Viale started, stated that Lewis was the subject matter of a grievance filed by Darin Stevens, however Viale admitted that Stevens never filed a grievance and that the matter was resolved at the end of the meeting with Kim Quick (T. E 23 & 420:1-10 & 419:24-25). There were managers within Roberts Dairy that had safety violations and OSHA violations that were serious matters, however none of them were fired (T. 99:4-13 & 259:9-24 & 453:12-15). Viale states he doesn't want drivers refusing to do their jobs, however he did nothing to deal with the performance issues involving Darin Stevens that were documented by Bag N Save (T. 432:17-25),

Viale had never done such an investigation of a supervisor to see if they were lying about a performance issue of an employee. (T. 440:9-20). In fact after Lewis was fired, when another supervisor wrote a memo regarding Stevens' poor performance, Viale did nothing to investigate the truth of the supervisor's comments involving Darin Stevens (T. 440:1-20).

Exhibit 24 was the note to Darin Stevens written by Lewis, telling him he indeed can have July 4th off, but he needed to make up his mind. That note was initially attached to Darin Stevens' letter of June 20, 2001, and given to Viale in the

meeting with Kim Quick, and Darin Stevens and ultimately placed in Lewis' personnel file. However, in response to plaintiff's discovery requests seeking the file, Lewis's note was detached from Stevens' note, and Lewis's note was not produced. (T. 284:10-286:13). The document that was withheld clearly set forth Lewis's position that Stevens was still being offered the July 4th week off on June 20, 2001 and it supported Lewis' testimony. In fact all the documents that supported the plaintiff's case were removed before the personnel file was produced to the plaintiff. The handwritten note saying "can't work ten years, fire him Friday" was removed from the personnel file (T. 108:15-110:21) along with the first termination letter showing an author date prior to Bag 'N Save being asked about Lewis' performance. (E 23 & T. 291:9-17)

The Plaintiff's counsel became aware of the existence of the documents when speaking with Kim Quick about his trial testimony approximately three days prior to trial. Following plaintiff's conversation with Kim quick, the Defendant delivered the withheld documents on the Saturday before the trial started Tuesday.

As this brief will point out much of the defendant's arguments made no sense. How can the reason the plaintiff was fired have been the March 2001 warning letter when Viale made the termination decision and knew nothing of the letter? How can Lewis be lying about Stevens performance when the defendant's own documents support that Stevens has performance issues? Roberts terminated

its two oldest managers, each with health issues after the two men refused to seek disability retirement. Roberts went so far as to suppress evidence that was contrary to its case that Lewis was fired for refusing to give Stevens the 4th of July off. A review of the evidence in the record clearly shows that Roberts violated the plaintiff's rights secured by the ADA and the ADEA. Neil Lewis seeks a reversal of the verdict in Roberts favor and a remand of the case for a new trial before a jury.

ARGUMENT I.

THE TRIAL COURT ERRED IN FINDING LEWIS' IMPAIRMENT DID NOT SUBSTANTIALLY LIMIT A MAJOR LIFE ACTIVITY

Can Neil Lewis get through a day? Yes. Give him a cooler in the vehicle, (T. 396:22-25) a refrigerator on his desk, (T. 58:16-19), let him write notes when his voice goes, (T. 67:20-68:3) let him rest his voice after every fifteen minutes of talking, (T. 57:19-22) let him drink 24 containers of pop a day, (T. 158:3-8) and put up with someone who doesn't sound good, (279:30-280:1) and hope people don't care that he is hard to understand (T. 255:22), then he can work. Will he ever again get the type of job he had at Roberts? No, who would hire someone with the restrictions Lewis has. "When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." Bragdon v. Abbott, 524 U.S. 624 (1998).

Even the plaintiff's doctor lauds Lewis for working so hard to live with what

she sees as a significant disability in the functions of breathing, speaking and eating. (E. 5). However the fact that he admirably deals with the impairment doesn't deprive him of the protections of the ADA. The trial Court concluded, "Plaintiff provided no testimony that is voice affected his day to day life in any significant way." (P. 9). It further concluded "Plaintiff provided no evidence that his ability to speak, when compared to the average population, is substantially impaired." (P. 9). In fact there was substantial evidence in the record regarding how the plaintiff's cancer affects his ability to breath, eat and speak. Viale told Dave Stovie he had a hard time understanding Lewis when he spoke (T. 255:22). Viale testified he recalled on occasion Lewis' voice is very raspy and he could barely talk. (T. 460:4-5). Viale knew the plaintiff carried a cooler and always needed something to drink in order to sustain a conversation (T. 396:22-25). The average person doesn't do that. In fact from the first conversation Viale had with Lewis he thought he had laryngitis. (T. 396:15-21). That was consistent with the type of problems with his voice that Lewis relayed in testimony. His voice wears out and he loses it all together. (T. 57:3-17). An employee who loses his voice when it is used does indeed have issues not faced by the general population. Mr. Lewis described problems when he dealt with customers. He can only sustain a face to face meeting for fifteen to twenty minutes, he then would cut sessions short and recuperate in his vehicle where he always had carbonated beverages to restore his voice. (T. 57:19-

22). At times Lewis' voice became inaudible at work and he relied on written communication when that occurred. (T. 57:23-58:2 & 68:1). In an active work day he drinks 24 containers of sugar free sodas just to keep his voice working (T. 58:5-6). He keeps the sodas in a refrigerator on his desk. (T. 58:16-19) or a cooler in his vehicle. (T. 396:22-25) Eventually his voice will stop until its' given a substantial amount of rest. (T. 57:25-58:2). His voice is not the only thing the cancer affected, "I had to learn to eat over again. When I take a drink, I have to exhale air instead of swallowing, and I have to be able to get that past all those tubes without it going and drowning me." (T. 56:23-57:4).

The plaintiff surgically lost the flap that covers the air tube when eating (T. 56:12-16) and his throat and esophagus were burned by radiation (T. 57:5-8), rendering his throat about one half the size of a normal throat which impairs swallowing and breathing (T. 57:9-13). He hesitates when speaking in order to make his voice work. (T. 57:2-8). It is simply not an accurate conclusion of fact to say "Plaintiff's voice caused him no problems whatsoever in his job" (Finding of fact #24).

Not just the durability, but also the sound of Lewis's voice was affected by the cancer. In describing Lewis' voice his supervisor stated " I quite honestly didn't find Neils' voice all that offensive." (T. 549:22-25). The man who fired Lewis was the only one ever to use the word offensive when describing Lewis'

voice. Viale did however have a hard time understanding Lewis when he spoke and he ad to listen closely to get what he said. (T. 25:22). The personnel director, Tom Frederickson, testified that it was apparent to him that Lewis didn't sound good; and he knew that Lewis had throat problems. (T. 279:20-280:1).

In concluding the plaintiff suffered no impairment at work, the trial Court seemed to be concluding that only if an impairment in a major life activity manifests itself at work is the employee to be afforded the protection of the ADA. That is not the case. In Bragdon v. Abbott, 524 U.S. 624 (1998) the Court found ADA protection extends to asymptomatic HIV individuals because they are limited in the major life function of reproduction. The district court is inaccurate in concluding that the plaintiff must virtually be without speech in order to be a qualified individual with a disability under the ADA. Essentially such an interpretation would leave someone with asymptomatic HIV as a qualified person with a handicap although appearing completely healthy, while a cancer victim who has ½ throat capacity and therefore loses his voice when it is used, cannot eat and breath at the same time and who must constantly have access to liquids is not a person with a disability qualified for protection under the ADA, it's an untenable result.

> Under the American's with Disabilities Act, the term "disability" means, with respect to an individual —
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1995).

Of course the threshold requirement for coverage under the ADA is that the plaintiff be a "qualified individual with a disability" consistent with the foregoing definition. So what is a physical impairment that substantially limits one or more major life activity? In this case the plaintiff suffers a physical impairment which is specifically recognized within the regulations that help construe the statutes. “A physical impairment is:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory **(including speech organs)**,

29 C.F.R. § 1630.2(h) (2001).

The next inquiry then is whether the impairment affects a major life activity. In fact speaking is one of the very major life activities that is covered in the EEOC regulations construing the ADA. 29 C.F.R. 1630.2(I) states: the term major life activity means functions such

as caring for oneself, performing manual tasks, walking, seeing, hearing, **speaking**, breathing, learning, and working.

The ADA's definition of disability is drawn almost verbatim from the definition of "handicapped individual" included in the Rehabilitation Act of 1973,

87 Stat. 361, as amended, 29 U.S.C. § 706(8)(B) (1988 ed.), Congress adopted a specific statutory provision in the ADA directing: “Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 706(8)(B) (1988 ed.).) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a). The directive requires the court to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act. Bragdon v. Abbott, 524 U.S. 624 (1998). In issuing the regulations that ultimately construed the Rehab act, HEW decided against including a list of disorders constituting physical or mental impairments, out of concern that any specific enumeration might not be comprehensive. 42 Fed. Reg. 22685 (1977), reprinted in 45 C.F.R. pt. 84, App. A, p. 334 (1997). The commentary accompanying the regulations, however, contains a representative list of disorders and conditions constituting physical impairments, including "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism.....In 1980, the President transferred responsibility for the implementation and enforcement of § 504 to the Attorney General. See, e.g., Exec. Order No. 12250, 3 C.F.R. § 298 (1981). The regulations issued by the Justice

Department, which remain in force to this day, adopted verbatim the HEW definition of physical impairment quoted above. 28 C.F.R. § 41.31(b) (1) (1997). In addition, the representative list of diseases and conditions originally relegated to the commentary accompanying the HEW regulations were incorporated into the text of the regulations. Bragdon v. Abbott, 524 U.S. 624, 639 (1998).

Clearly cancer and speech related impairments are on the list of those recognized as being accorded ADA protection. The next inquiry then is whether the impairment to speech, eating and breathing is significant enough to qualify for ADA protection. Keep in mind all witnesses who were asked about Lewis' voice admitted his manner of speech was affected. Viale said he thought Lewis has Laryngitis, (T. 396:15-21), he had to really listen carefully when Lewis spoke as he had a hard time understanding him. (T. 255:22-23). Fredrickson said clearly something was wrong with Lewis' voice. (T. 279:16-23) Lewis described the drinking routine he needs to go through just to be able to speak, (T. 58:16-25 & 58:3-7) and of course at times he cannot speak at all. (T. 58:1-2).

"An impairment is "substantially limiting" if it ..... significantly restricts the condition, manner, or duration under which an individual can perform such an activity compared to the general population. 29 C.F.R. § 1630.2(j)(1)(i)-(ii). Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 948 (8th Cir. 1999)." Philip v. Minnesota. Ford Motor Co., 328 F.3d 1020, 1023 (8th Cir. 2003)." The plaintiff

need not be mute in order to have ADA protection. Compared to the general population he can't speak like they do. He must drink 24 cans of soda a day just to keep speaking. That meets the ADA definition. His manner of speaking depends on ability to get to fluids and how much he can rest his voice between using it. The cancer affected the condition of the plaintiff's voice and the manner in which he speaks, he's hard to understand and one must listen carefully. His voice always sounds bad, it just sometimes does not sound at all. Clearly he meets the substantial impairment definition, he sounds worse than anyone else and he always must be treating his voice to be able to use it.

The duration that Lewis can speak is limited to about twenty minutes and then must be followed by substantial rest. (T. 57:19-58:2). The trial Court referred to the fact the plaintiff's cell phone is used 2200 minutes a month. That breaks down to him having the phone on 1.8 hours a day. Presumably some of those logged minutes are spent listening. Can the plaintiff talk 1.5 hours a day? Yes, he must have a soda in hand and he's hard to understand while doing it, and he can only talk fifteen minutes at a time, but he can speak 90 minutes a day. That doesn't mean he doesn't have a substantial impairment of his ability to speak.

None of the cases cited by the District Court opinion involve a cancer patient whose throat had been permanently damaged to the point he must continually have something to drink in hand in order to be able to speak. Vailes v.

Prince George's County 2002 WL 142117 (4th Cir. 2002) involved an employee whose doctor reported the employee had good voice clarity. Lewis' doctor reported he has "significant problems with swallowing, talking and breathing that he must work around. He has sleep problems related to the throat issues and he has a significant disability with regard to his voice." (Ex. 5). None of the cases cited involved an employee who relied on writing notes when his voice gives out or who limits conversations to fifteen minutes and then relies on resting their voice to be able to speak like the plaintiff must do.

The District Court opinion places the threshold for coverage under the ADA much too high. Especially when the regulations which govern administration of the law make clear that speaking and breathing are major life activities. The Court enquires into whether the plaintiff could perform a variety of tasks central to daily living. (Opinion p. 10). In fact that inquiry is irrelevant. When there is an impairment to a function the law recognizes as a major function, the only inquiry is how significantly is the function impacted. Compared to a normal individual, Lewis' ability to speak is substantially limited.

ARGUMENT II.

THE TRIAL COURT'S RULING THAT THE DEFENDANT PROVED A LEGITIMATE NONDISCRIMATORY REASON WAS NOT SUPPORTED BY THE EVIDENCE WHICH PROVED THE ARTICULATED TERMINATION REASONS WERE A MERE PRETEXT TO HIDE AN ILLEGAL MOTIVE.

ADA claim is analyzed under the burden-shifting framework set forth in McDonnell Douglas and its progeny. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Under this framework, a discrimination plaintiff must first establish a prima facie case of discrimination. See Christopher v. Adam's Mark Hotels, 137 F.3d 1069, 1071 (8th Cir. 1998). If he satisfies this initial burden, a rebuttable presumption of discrimination arises, and the burden shifts to the defendant to rebut the presumption by articulating a legitimate, nondiscriminatory reason for the adverse employment action.

Once the defendant has advanced a nondiscriminatory reason, the presumption disappears and the plaintiff bears the burden of demonstrating that the employer's proffered reason is merely a pretext for intentional discrimination. The plaintiff retains at all times the ultimate burden of proving that the adverse employment action was motivated by intentional discrimination.

The record overwhelmingly supports a conclusion that the defendant's articulated reason for firing Lewis were pretextual. The Court found that the reasons the plaintiff was fired were (a) he had been warned of a performance issue in March of 2001 (b) In July 2001 he did not follow the contract in denying Stevens a vacation and (c) He lied about Stevens having performance issues. John Viale

admits however that two of those reasons really did not motivate the termination. It is a clear abuse of discretion to find an articulated reason carries the day when the employer admits two of the reasons are false. Viale made the decision to fire Lewis before he knew of the earlier letter. (T. 303:11-15). Viale admits that an initial allegation that Lewis denied a vacation in violation of the union contract and said he didn't care was disregarded as a reason to terminate Lewis. (T. 412:10-413:3). Pretext is proven by showing the articulated reason is not true. All three reasons for the termination were easily disproven.

a. The Warning Letter of March 2001

The most easily dealt with of the three reasons found by the court is the March 2001 "warning letter." The termination decision was made before the one who made the termination decision knew that there had been such a letter (T. 303:11-15). The letter referred to didn't exist as far as Viale was concerned, so it couldn't have anything to do with the termination decision. Viale testified that the March 2001 reprimand letter from Powell regarding the Penoral Wiley matter which had occurred in 1997 and an allegation of sexual harassment from 2000 had nothing to do with his decision to terminate Neil Lewis. (T. 443:19-21). Likewise, Tom Frederickson testified Mr. Viale made the decision to fire Mr. Lewis before he knew of the existence of the March 7th, 2001, letter (T. 303: 13-15). Despite that evidence, the trial court made several findings regarding the Penoral Wiley matter

concluding that the warning letter regarding the incident combined with the Stevens matter cost the plaintiff his job.

The Penoral Wiley matter should have been put to rest with Viale's testimony that it had nothing to do with Lewis's termination. However even if the matter was relevant, it clearly was a mere pretext to hide the real motive for the termination. The sequence of events surrounding the placement of the letter in the plaintiff's file was not dealt with in the trial court opinion, but is very telling when it comes to Robert's motives. When Powell took his job in the Fall of 2000 he said two very significant things: (1) he had been told that Roberts couldn't run the pedal department without Lewis. (T. 566:1-2) and (2) all employees would begin with a clean slate as that's his style of management, "we move forward from that day" (T. 564:9-19). On March 9, 2001 Jeff Powell directed that a note he wrote be placed in Lewis's personnel file the note said, "can't work ten years, fire on Friday." (Ex. 21, 2nd page). He didn't fire Lewis on Friday, but Lewis was called into a meeting at about that same time and despite the clean slate policy, he was reprimanded in writing for how he handled the Penoral Wiley matter in 1997 and for an allegation sexual harassment that had been resolved the year before. (T. 76:13-16).

So why is it the clean slate policy applied to all but Lewis. An employer's failure to follow its own policies may support an inference of pretext. Young v. Warner-Jenkinson Co., 152 F.3d 1018, 1024 & n. 6 (8th Cir. 1998).

Powell didn't know what Lewis had done wrong in the Penoral Wiley matter and he never asked Lewis about the matter. (T. 487:16-488:3). At trial he testified he couldn't remember anything Lewis had done wrong in the matter. (T.597:3-581:14). Indeed he didn't work there in 1997. Why was the clean slate policy applicable to everyone but the guy who can't work ten years?

A review of the Penoral Wiley matter shows just how thin was the ice where Powell was skating in issuing that reprimand. Penoral Wiley applied for a job in November of 1997 just as the plaintiff was returning to work from a heart attack. (T. 69:24-70:1). The plaintiff offered Exhibit 32, the complaint Penorall Wiley actually filed because it indicated Mr. Nelson and a route driver named Larry were the persons who she was concerned about in the hiring process (T.577:14), however the offered document was objected to and the objection sustained. The individual that knew the most about the hiring process was Jim Caputo the safety manager at the time, but no one ever questioned him about what had happened after Wiley filed suit. (T. 43:7-10). Indeed the only individuals who testified about the Wiley matter that had worked for Roberts in 1997 were Neil Lewis and Jim Caputo. The current management knew nothing about the hiring of Penoral Wiley. Jim Caputo testified that he was one of those that made the decision not to hire Wiley, (T. 43:11-13) and Lewis had done everything right in the hiring process, (T. 42:19-20) Lewis had wanted to hire the woman. (T. 41:6-19). Caputo was

concerned that he saw the woman exhibit difficulty backing up and she had no experience with a stick shift. (T. 45:5-12). The evidence that Lewis had done nothing wrong in the Wiley hiring was virtually unchallenged because no one, including those who reprimanded Lewis could say what he possibly had done wrong. The only thing Powell knew when he wrote the reprimand was the pedal department couldn't run without Lewis and Lewis can't work ten years. (T. 412:20-23).

(b). Failing to follow the contract

The Trial Court found the second articulated reason Roberts fired Lewis was that Lewis admitted to Viale that he did not follow the contract and denied Stevens a vacation, and when confronted with it he said he knew about the contract and did it anyway. Viale began the termination letter on July 29, 2001 and indeed had such language in a proposed termination letter. (Ex. 23). When it came time to fire Lewis, however Viale took out all reference to not complying with the bargaining agreement, realizing it would be too easy to see through such an excuse. (T. 412:20-413:3). Indeed that termination reason was never even articulated at all until two days before trial because exhibit 23 was removed from Lewis' personnel file, never given to Lewis and not produced in discovery.

How could such a reason hold water? Lewis continued to tell Stevens he could have the day off up to June 20, 2001 when Lewis put it in a memo. (Ex. 24)

The vacation was not denied Stevens. Once Viale figured out that Lewis had even put it in writing that Stevens could have the day, he knew he couldn't be persuasive using the denial of a vacation to fire Lewis.

The fact that Viale kept changing the reason to fire Lewis is significant and should have been considered as evidence of pretext. In Kobrin v. University of Minnesota, 34 F.3d 698, 703 (8th Cir. 1994) the Eighth Circuit held that substantial changes over time in the employer's proffered reason for its employment decision support a finding of pretext. In essence Viale took that a step further, he decided to terminate Lewis and then tried to come up with a reason that could support it, concluding that the excuse that Lewis ignored the contract in denying a vacation would be too easily disproven.

(c). The Darin Stevens Matter

Viale testified:

Q. ...So that really wasn't the basis upon which you were terminating him. A. No. I was terminating him for lying Q. Do you recall that testimony? A. Yes. (T. 448:17-21)

The true articulated reason why Lewis was fired, was he allegedly lied when he said Bag 'N Save expressed concern about Darin Steven's service. The timing, however would indicate the Darin Stevens matter was only the vehicle to terminate Lewis, when in fact Viale decided to get rid of Lewis before he heard from Darin Stevens. Viale admits the first real conversation he had with Lewis was

June of 2001 when he rode with Lewis. (T. 402:21-23). He admits he spoke to Lewis about his voice in that conversation. He learned about the cancer and Lewis' need to constantly be drinking sodas. (T. 396:22-25)

Viale testified that Darin Stevens complained on July 20, 2001 in a meeting that Lewis had denied him a vacation. Viale states he then went to Lewis on July 21st or 22nd about the matter and in the conversation asked Lewis about Stevens performance. (T. 410:19-21). Lewis told Viale he gets complaints about Stevens the most recent from Bag 'N Save and Bergan. (T. 433:21-434:8) Viale believed Lewis, no reason to think he'd lied.

Q. So as soon as you knew that Lewis was telling you about the complaints against Stevens, you knew that was true because that happens with drivers? 18 A. Yes.

(T. 410:15-18)

Five days later, Viale had a conversation with Tom Fredrickson, the personnel director who told him age and disability have no impact if you fire someone for lying. (T 404:1-9). Two days after the personnel director told Viale that he can't be sued for age and disability discrimination if he fired someone for lying, Viale's typed a draft letter to fire Lewis for lying and that same day began investigation of Lewis to see if he lied. (Ex. 23) The letter came before he even undertook the investigation, he just set out after Fredrickson suggested lying as a way to get rid of someone so as not to worry about age or disability and Viale isn't shy about

admitting it:

Q. so you felt that you had been successful in your efforts to find out if he lied?
Answer: No. I knew I -- I had.
Q. You knew you had been successful in your efforts to find out if Mr. Lewis lied?
Answer: Yes.

(T. 400:13-18)

Q. You remember talking about Mr. Lewis's voice in the drive you made with him in the summer of 2001; isn't that right?
A. That is correct.
Q. That's the most substantial conversation you ever had with Mr. Lewis was that particular drive; isn't that right?
A. That is correct.
Q. Then after that drive, there was an effort that you undertook to see if he had lied. How long after that drive did you make that effort?
THE WITNESS: Can you ask the question again?
BY MS. McMAHON-BOIES:
Q. How long after the drive with Mr. Lewis did you undertake the effort to see if he lied?
A. Probably, I would say, four to six weeks, maybe six weeks.

(T. 402:17-403:16)

Q. On July 29th, you began a termination letter for Mr. Lewis alleging he lied about Bag 'N Save voicing issues and about Stevens; didn't you? A. Yes.

(T. 403:18-21)

Q. And that followed your conversation with Mr. Fredrickson about firing people with disabilities and older people by two days. That was July 27th. Is that right?
THE WITNESS: It was two days after my conversation with Tom Fredrickson.

(T. 404:1-9)

The only problem was he was typing a termination letter without ever having checked with Bag 'N Save to find out if Stevens had performance issues at the

store just as Lewis said. When he did have someone check with Bag 'N Save on July 30, 2001 the employees there confirmed that Stevens did indeed have just the kind of performance issues that Lewis had told Viale he had there, he leaves shorts and wouldn't take returns. They even got written statements from the store to confirm those problems on July 30, 2001. (Ex. 18 & 19). When Viale got the confirmation that Lewis was not lying about Lewis's performance problems, he fired him anyway for lying. That's the most solid evidence of pretext one could ever hope to have. Viale admitted he found the person Lewis had spoken to at Bag 'N Save and the person confirmed Stevens had a problem delivering shorts to his store, just the problem that Lewis conveyed to Viale was the concern voiced to him:

Q. And you did track down the gentleman that had moved to York, Nebraska; is that right?
A. Yes, we did.
Q. And was he aware of any complaints that he had against Mr. Stevens?
A. I believe that he said, you know, well, there had been some shorts (T. 465:5-13).

What did they do, they fired Lewis for lying when he said Bag 'N Save employees were concerned about Steven's delivering shorts, short codes and not taking returns when in fact all objective evidence pointed to that being the absolute truth.

The overwhelming weight of the evidence showed that Darin Stevens had on

going performance issues while at Roberts Dairy. He liked being supervised by Neil Lewis, he could work with Neil, it was his last supervisor who kept documenting his performance that he had the most problems with. (T. 216:8-16). Clearly Neil Lewis' termination wasn't performance driven. If performance was a concern of the company, Darin Stevens wouldn't be working. He admits his supervisor brings complaints to his attention that come from customers, (T. 206:10-21). He admits he gets complaint that his deliveries are short, he delivers short codes, he doesn't rotate product and he delivers leaking containers. (T. 206:10-21 & 207:4-8). He regularly got warning letters from his last supervisor (Ex. 1, 2, and 5) and he was threatened with discharge if he kept delivering outdated product. (T. 211:1-212:22). He even admits he got more complaints about out dated product from Bag 'N Save after that warning. (T. 211:1-212:22). Stevens personnel file documented these performance issues and when Roberts solicited comments on Stevens it is told he delivers outdated product, his deliveries are short and he doesn't pick up returns, all of which are part of his job. (Ex. 18 & 19 & T. 214:1-24). A cursory look at his personnel file would have verified everything Lewis said: "I have talked to you several times regarding customer complaints and your responsibilities to the customer and Roberts Dairy. It seems you have elected not to pay attention. Hopefully you will pay attention to this warning letter. Your failure to do so will result in a three day suspension or possible termination." (Ex.

6, 1 and 2).

The "investigation" of Lewis was clearly bogus. Viale admits that in any other case, if a supervisor had told him there were complaints about an employee his response would be to find out why the driver was not performing, in no other case would he have investigated whether the supervisor was telling the truth. (T. 440:9-15). So why in this one case did Viale turn things around and instead of being concerned about nonperformance of a driver did he instead begin an investigation to prove the supervisor was lying? He had just come from a conversation On July 27, 2001 with the personnel director who told him if he can find Lewis lied he could fire him and not have to worry about age discrimination and Lewis' health. (T. 398:21-399:19).

The Court made a finding that Bag 'N Save was removed from Darin Steven's route in retaliation for him complaining about being denied a vacation. That finding was clearly contrary to the evidence. The removal of that account from Stevens was a nonissue in Lewis' termination. Stevens testified that Bag 'N Save was not removed from his route until after Lewis left. (215:13-23). In fact he admitted the note he wrote about the June 20, 2001 conversation outlined all his concerns about Lewis and it mentioned nothing about Bag N Save. If Lewis had really removed that account, it would have been in his note.

Q You attempted to be pretty specific and all-encompassing in all those notes you

made of that conversation; didn't you?
A. Yes.
Q. There is nothing in that conversation that referred in any way to a Bag 'N Save route; was there?
A. No."

(T. 204:22-205:2). When Stevens met Viale on July 20, 2001 nothing was mentioned about Bag 'N Save:

Q. When you met with Mr. Viale, what you did is read your note; isn't that right?
A. Yes.
Q. And that's all you did in that meeting; isn't it?
A. Yes.
Q. And the word Bag 'N Save do not appear in that note; do they?
A. In what note.
Q. The note that you read to Mr. Viale when you met with him?
A. No, it does not.

(T. 247:4-14)

The meeting with Viale occurred July 20, 2001 (T. 606:18-21) and Bag 'N Save was not an issue then with Darin Stevens. It only became an issue later that week when Lewis raised the store as one that complained when Viale asked Lewis what kind of employee Stevens Was. (410:19-411:6) Viale admitted that when he spoke to Lewis on July 22, 2001 Bag 'N Save was still an account of Stevens. (T. 433:21-434:13). Lewis was fired a few days later, it was Lewis's successor that removed the store from the route, and why not? Stevens' track record there was not good. It was Lewis' job to structure accounts and one thing to keep in mind is how the driver is servicing a particular account, (T. 435:14-24) however by all

indicators Lewis did not take Bag ‘N Save from Stevens, his successor did.

Roberts never consistently asserted that Lewis did remove that account from Stevens. When they canvassed Bag ‘N Save to find out if Stevens had performance issues, they did so with a form that identified the Bag ‘N Save route driver for the store on July 30, 2001 to be Darin Stevens. (Ex. 18 & 19) It would have been very misleading to be soliciting information on a driver that they were not properly identifying as the delivery person for the route. For the Court to conclude that Lewis was fired for removing the Bag ‘N Save route from Stevens was error, that route was not removed until Lewis was long gone. Stevens was shown Exhibits 18 and 19 the forms that identified him as the delivery person for Bag ‘N Save on July 30, 2001 and outlining concerns about his shorts and short codes. “Q. Those would indicate complaints from Bag 'N Save on July 30th, 2001; wouldn't it? A. Yes.” (T. 213:1-4). He admitted those were complaints from Bag ‘N Save on July 30 about his performance, if that store was not on his route, he probably would have said something about them complaining about him when he wasn’t even the driver (T. 213:1-4). As it is he admits the account was lost after Lewis was gone (T. 215:13-23).

Viale was faced with an employee who has a long history of customer complaints, has been under the influence on the job, had admitted to consuming 22 beers over the course of the weekend prior to the deposition which was on a

Monday. (T. 203:5-8). And what does Viale say to Stevens: "thanks for bringing this to our attention" (T. 217:5-7) and he set out to disprove that Stevens had a complaint from Bag 'N Save about his work. Viale, however admits the person who complained to Lewis confirmed Lewis' version of the facts (T. 465:5-13). But that didn't matter he fired him for lying anyway. Viale prides himself on knowing how to get rid of people, (T. 275:3-8) and his quest to find Lewis in lie was a prime example.

The plaintiff has proven pretext by showing how little sense can be made of Viale's quest to label Lewis untruthful. The articulated reasons for the termination did not hold up. " When an

employer has offered different explanations for an adverse employment action and when evidence has been presented that would allow a reasonable trier of fact to disbelieve each explanation,

the trier of fact may reasonably infer that the employer is hiding something — that is, that the true explanation is unlawful discrimination." Young V. Warner-jenkinson Co., Inc., 152 F.3d 1018, 1025 (8th Cir. 1998).

ARGUMENT III.

THE RECORD PROVIDES PROOF THAT AGE AND THE HEALTH OF THE EMPLOYEES DETERMINES THEIR EMPLOYMENT FUTURE

Proving the articulated reason is unworthy of belief satisfies the plaintiff's

burden to prove pretext, but does not end the inquiry. The plaintiff must show at least an inference that age and his disability were factors in the termination. The Supreme Court recognized that there will be cases in which a plaintiff establishes a prima facie case and produces some evidence of pretext, but nevertheless fails to make a submissable case of discrimination:

> For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 2106 (2000) at 2109. In this case the plaintiff's evidence of pretext was strong and the employer gave no reason other than "Lewis lied" to support it's decision.

In any case the plaintiff produced evidence that Viale had a plan to rid Roberts of its oldest managers. Both Stove and Lewis, the two with health problems and the two oldest managers working under Viale, (T. 394:12-14) were subjected to the very same arbitrary treatment. They were cut out of meetings (T. 260:10-17) and both were encouraged to look for work elsewhere, (T. 80:13-14 & 265:23-24). Both were fired when they would not look elsewhere (T. 264:22-25) shortly after Viale came on board. Both men felt Viale was wanting them to quit by June 2001. (T. 266:11-13). Viale never denied telling Stovie in May 2001 that the

plan was that they would fire Lewis and Stovie would quit in protest. (T. 258:8-259:5). Both of these men were approached by Tom Frederickson and encouraged to seek disability retirement. (T. 79:3-15 & 265:9-13). It was after they refused that they were fired. Viale waited to put his management team together until after he had rid Roberts of the two older men. (T. 393:16-23)

The evidence regarding the similar treatment of the two oldest key managers was ignored in the trial court decision. The fact the two oldest, both of whom have health problems got terminated under almost identical circumstances provides strong evidence of an improper motive.

Prior to firing Lewis and Stovie, Viale asked their ages on more than one occasion in conversations with them and he discussed Lewis's age with the personnel director (T. 252:6-20 & 267:1-11 & 399:1-19). The motive to terminate the older managers with health issues is shown by virtue of the identical treatment accorded Stovie. Was Lewis really fired because Viale thought his quest to find a lie succeeded, or because Viale was out to rid himself of the two older managers who had health issues? Viale ended up with a younger management team by ridding himself of the two oldest. Showing a pattern in treatment of employees can serve as proof of an illegal motive once pretext is shown: "A plaintiff may meet the last requirement by presenting either statistical evidence (such as a pattern of forced early retirement or failure to promote older employees) or `circumstantial' evidence

(such as comments and practices that suggest a preference for younger employees)." Hanebrink v. Brown Shoe Co., 110 F.3d 644, 646 (8th Cir. 1997).

Lewis is the only person Viale has ever subjected to a personal quest to find an lie. He has two hundred and forty employees under his supervision (253:24-25). He admits he spent a great deal of time trying to catch Lewis in a lie (454:3-6), even though his usual course upon being told by a supervisor that an employee has a performance issue is to find out what the employee is doing wrong. (T. 440:9-20). Why would a plant manager spend all this time trying to find a lie?

The failure to follow the normal business practices is also added proof of an illegal motive. At the same time that Fredrickson was pressuring Lewis to seek disability retirement, Powell was violating his clean slate policy by issuing Lewis a warning about conduct from years ago and placing a note in his file "can't work ten years." An illegal motive can be derived from that note alone, but when it's combined with an encouragement to seek disability it's clear these people had Lewis's health and retirement on their mind.

ARGUMENT IV.

VIALE CONTRADICTED HIMSELF AND HIS TESTIMONY DOES NOT SUPPORT THE FINDINGS OF FACT

One of the most troubling aspects of the Trial Court ruling is the evaluation

of the credibility of Viale compared to Lewis. In addressing the plaintiff's description of the ride Viale took with him the plaintiff, Lewis stated that Viale asked him about his health and encouraged him to look for another job given the stress of the position his health and age. The Court states "It makes no sense that Viale would then turn around and make discriminatory comments to Plaintiff." (#12). Viale admits he spoke to the plaintiff about his health in that vehicle ride. Lewis wasn't the only one to describe such a conversation. Stovie heard the very same thing from Viale had with him before Viale fired him. (T. 265:23-24) Viale admits that he yells and used profanity at work. (T. 452:14-17). He's not the most professional guy. Third party witnesses testified that Viale was proud of his ability to get rid of people (T. 261:13-22) and spoke of a scheme whereby he would fire Lewis and Stovie, would quit. (258:8-259:5). He thereby gets rid of his two oldest key managers. Where he admits a conversation took place about Lewis' health is it a stretch to believe he suggested that given his health he should find something less stressful?

A review of the transcript shows Viale was repeatedly impeached as inconsistent with his deposition testimony and with testimony given at trial. Several pages of Viale's testimony is included in the addendum and exemplifies his changing testimony. Viale does not portray himself as a forthright individual. He wouldn't even admit acknowledge Exhibit 23 is a letter, (T. 404:10-17). what

makes him more credible than the other witnesses? Very little of what plaintiff cites in this brief is the plaintiff's testimony. His case was made on the testimony of Fredrickson, Powell, Viale, Stovie and Caputo. Essentially the trial Court is finding Viale was the only credible witness.

On one occasion Viale went so far as representing that he had Bag 'N Save's personnel files searched to track down all the people Lewis talked to. (T. 438:6-8) That came as a real surprise to the store manager who insisted he never would have given Viale such information. (T. 538:19-539:6). Much of Viale's testimony was successfully impeached, he was never credible.

ARGUMENT V.

THE DISTRICT COURT OPINION FAILS TO DEAL WITH THE EVIDENCE OF AGE DISCRIMINATION

Why couldn't the plaintiff work ten years? Why were the two oldest key managers excluded from the management team, the Christmas party and fired within months of each other despite having sterling work records? Why were they fired after first being told to retire? Those matters weren't dealt with in the Court's decision. The overwhelming evidence of pretext effectively dealt with Robert's excuse for the termination. What really motivated Viale? He made up his management team only after he fired his two oldest. (T. 393:16-23) The court stresses the fact that Lewis was promoted when he was over forty, however that

wasn't under Viale and Powell's watch. As soon as Powell came on board he treated Lewis differently than all the other members of the staff. He was the only one written up in contravention of the clean slate policy and the only one documented as "can't work ten years" What set Lewis apart? He was the oldest manager. However when Lewis was gone, they fired the second oldest too. Age is indeed a factor in how the plaintiff was treated, nothing else explains what happened to Neil Lewis and Dave Stovie.

CONCLUSION

A time line is helpful in showing how Lewis' termination unfolded:

FALL 2000 Powell hired and told the pedal department can't run without Lewis/has a policy that everyone starts with a clean slate. (T. 564:9-19)

March 8, 2001 Powell gives Lewis a last chance letter for disciplinary allegations stemming from incidents in 1997 and 2000. (Ex. 128)

March 9, 2001 Powell places letter in Lewis file "can't work ten year, fire him Friday" (Ex. 21)

March 9, 2001 Tom Fredrickson encourages Lewis to file for disability retirement. (T. 75:3-15)

June 2001 Viale has his first extended conversation with Lewis on a drive with him. (T. 402:21-23). He admits talking to Lewis about his health. (T. 402:17-20)

Lewis states Viale told him to retire due to his age and health or Viale would fire him (T. 75:17-80:14)

June 20, 2001 Stevens and Lewis talk about July 4th (T. 97:2 & 97:8-16)

July 20, 2001 meeting between Stevens, Viale, Fredrickson, and Quick wherein Stevens reads his note, says nothing about Bag 'N Save. (T. 351:3-6 & 247:4-8).

July 21, or 22, 2001 Viale asks Lewis about Steven's performance Lewis states he has complaints about shorts and short codes from Bag 'N Save and Bergan. (T. 410:19-22)

July 27, 2001 Fredrickson tells Viale you can fire for lying and not worry about age and disability (T. 399:1-19)**.**

Date not certain Viale speaks to individual that complained to Lewis about Stevens and he confirms he complained about Stevens delivers shorts (T. 465:5-13)

July 29, 2001 Viale begins termination letter alleging you denied the vacation and you lied about Bag N' Save having complaints about Lewis. (T. 399:1-19).

July 30, 2001 Bag 'N Save approached in writing to review Stevens, their current delivery person, forms confirm Stevens delivers shorts, has short codes and won't take returns. (Ex. 18 & 19).

July 30, 2001 Lewis is fired for lying about Bag 'N Save having performance

concerns about Stevens. (T. 448:17-21).

The Court ultimately concluded that there was a legitimate nondiscriminatory reason to fire Lewis. This man went from we can't do without him in the Fall of 2000 when Powell took over to can't work ten years to your fired, you lied, and they were still raving what a good job he did. The business needed him, he was good. The two oldest key managers, both with health problems were fired within a year of when Viale took over day to day operations. Neither had any job deficiencies that were shown by the evidence. If it wasn't age and health, and it wasn't lying what was it? The record provided evidence that Viale inquired of others about Lewis' voice and age. Not just the oldest, but the second oldest as well was fired, and after the two oldest are gone, the management team is put in place. The record supports that the only explanation for what happened to Lewis and Stovie is that they were too old and Viale has no patience for health issues.

For Appellant:_____
Carole McMahon-Boies 16890

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Comes now Carole McMahon-Boies as attorney for the appellant and hereby states that this brief complies with the typ-volume limitation of Fed. R. App. P. 32 (a)(7)(B) beacause this brief contains 10,168 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7B)(iii).

This brief was prepared using Corel Word Perfect 10, using the Times New Roman Font at 14 pitch.

Neil Lewis, Appellant
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_____

For the firm #16890

ADDENDUM

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NEIL LEWIS,	)	4:02CV3122
	)	
Plaintiff,	)	**FINDINGS OF FACT**
vs.	)	**AND CONCLUSIONS**
	)	**OF LAW**
ROBERTS DAIRY COMPANY, INC.,	)	
	)	
Defendant.	)	

After a mistrial was declared when the jury was unable to reach a verdict in this ADA and ADEA case, the parties stipulated that it should be submitted to the court for decision, based upon the existing record. Both parties have submitted proposed findings of fact and conclusions of law (filings 115, 116), and also have responded to each other's submissions (filings 117, 118).

After carefully reviewing the trial transcript, I now issue my findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).1 Based thereon, I will dismiss Plaintiff's claims and enter judgment in favor of Defendant.

I. FINDINGS OF FACT

1. Defendant, Roberts Dairy, is a manufacturer and distributor of dairy products with its headquarters located in Omaha, Nebraska. (Stipulation)

2. Jeff Powell is the president and general manager of Roberts Dairy. Powell took that position October 1, 2000. (Powell, 556:10-13)

1 Any finding of fact more properly characterized as a conclusion of law, and any conclusion of law more properly deemed a finding of fact, should be so

3. Jeff Powell is forty-seven years old. (Powell, 556:14-15)

4. Tom Fredrickson has been Roberts' personnel director since 1999. (Fredrickson, 278:17-19)

5. John Viale began as Robert's Omaha division manager on March 22, 2001. (Viale, 456:4-7)

6. John Viale's date of birth is October 24, 1949, and he was fifty-one when Roberts hired him. (Viale, 437:17-19)

7. Plaintiff's date of birth is May 16, 1944. He is currently fifty-nine years old. (Lewis, 50:1-2)

8. After working for Roberts in the early 70s, Plaintiff returned to Roberts in 1989, when he was forty-four or forty-five years old. (Lewis, 50:11-13; 51:24-25)

9. Plaintiff was promoted from route foreman to wholesale manager in 1995. (Lewis, 54:8-12)

10. The wholesale manager supervises routes in Roberts' so-called "peddle department." (Lewis, 62:10-12)

11. At one time Plaintiff supervised 33 drivers in the "peddle department." The drivers belonged to the Teamsters Union. (Lewis, 63:2-4)

12. John Viale and Jeff Powell believed the "peddle department" was a well-run department. (Viale, 394:15-395:10)

13. Plaintiff claims that throughout his employment at Roberts Dairy, no one had any negative comments about his performance. (Lewis, 59:1-6)

14. However, Plaintiff's Employee Performance Evaluation dated December 10, 1999, showed his lowest score in interpersonal skills. Mike Flagg, the former Omaha division manager, signed the review. (Exhibit 101)

15. Plaintiff's Employee Performance Evaluation dated November 30, 2000, showed his lowest score

was again in interpersonal skills. Mike Flagg performed the review and added: "You need to get beyond 'playing with people' and 'getting them

back.' Your ultimate goals are correct. However, we could do without 'the games.'

Your results are good." (Exhibit 102)

16. Plaintiff had surgery for throat cancer on November 3, 1992. (Lewis,

54:13-55:12)

17. Plaintiff was promoted to wholesale manager after he came back from

having cancer surgery. (Lewis, 54:16-19)

18. Tom Fredrickson was aware that Plaintiff's voice was gruff, but was

unfamiliar with the specifics of his heath. (Fredrickson, 309:22-310:3)

19. Plaintiff did not take any sick time from work. (Fredrickson, 310:6-9)

20. Plaintiff's throat impairment never affected his job performance. (Lewis,

149:14-16)

21. Plaintiff's cell phone was never off; it was on 24 hours a day, seven days

a week. (Lewis, 129:21-22)

22. Plaintiff averaged over 2,200 minutes of airtime a month on his company

cell phone. (Lewis, 149:17-24)

23. Plaintiff never received any negative reaction of any kind from

customers regarding his voice while he was at Roberts Dairy. (Lewis 149:21-24)

24. Plaintiff's voice caused him no problems whatsoever doing his job at

Roberts Dairy. (Lewis, 150:5-9)

25. Penoral Wiley was a black, female applicant who applied for a driver position in 1997. (Lewis, 69:24-70:4)

26. Plaintiff claims that he gave Wiley a driving test and failed her because she could not drive. (Lewis, 70:17-21)

27. Despite the fact that Plaintiff claims Wiley could not drive, he admits that they drove halfway to Sioux City, and back down I-29 to Omaha. (Lewis, 154:20-155:3)

28. Wiley filed a charge of discrimination and subsequent lawsuit alleging race discrimination which Roberts settled. (Powell, 561:4-563:4)

29. Plaintiff was issued a last chance agreement by Jeff Powell and Tom Fredrickson in March 2001 regarding his involvement in the Penoral Wiley matter, including falsification of documents related to driving tests, and for a past sexual harassment incident. (Lewis, 73:8-76:18) (Exhibit 128) (Powell, 563:16-564:19) (Fredrickson, 346:6-22).

30. The meeting lasted at least thirty minutes and Jeff Powell explained in detail to Plaintiff why he was being disciplined. (Powell, 565:17-567:3) (Fredrickson, 346:13-22)

31. The sexual harassment complaint came from an employee, Deb Edwards. She complained to Fredrickson that Plaintiff rubbed her shoulders and flipped her

hair, and that he made her uncomfortable. (Fredrickson, 313:12-22)

32. Fredrickson spoke to Plaintiff and told him not to touch Edwards and not to retaliate against her. (Fredrickson, 313:23-314:12)

33. Plaintiff confronted Edwards about her complaint, and Edwards complained again to Fredrickson. (Fredrickson, 314:13-315:5)

34. Edwards' husband also called Fredrickson to complain. He told Fredrickson that Plaintiff had called him and tried to smooth over his behavior and told Mr. Edwards that he did not mean anything by it. (Fredrickson, 316:7-11)

35. Plaintiff claims to know the Roberts' Code of Ethics backwards and forwards. (Lewis, 146:10-15)

36. Plaintiff claims that Viale made threatening comments about Plaintiff's health and age in May 2001 when Viale rode along with Plaintiff to visit some Roberts' customers. (Lewis, 80:6-14)

37. Viale denies ever making threatening comments. (Viale, 459:5-461:12)

38. Plaintiff admits that Viale was complimentary to him in front of his customers on Viale's ride along. (Lewis, 163:5-8)

39. No one ever witnessed any threatening comments made to Plaintiff by Viale or anyone else at Roberts. (Lewis, 162:2-4)

40. The drivers at Roberts Dairy are represented by a union and are covered by a collective bargaining agreement. (Quick, 496:9-497:1)

41. The drivers bid for vacation days in December of the prior year. Vacation requests are granted based on seniority. (Lewis, 95:14-15)(Stevens,

222:6-14)

42. Part of Plaintiff's job was to schedule vacation as per the collective bargaining agreement. (Viale, 425:16-18)

43. In December 2000, a driver, Darin Stevens, bid on vacation time for the week of July 4, 2001. Plaintiff specifically informed him that he could not have that week of vacation. (Stevens, 250:5-12)

44. At trial Plaintiff claimed that he and Stevens were social acquaintances; however, Plaintiff stopped having Stevens over to his house "socially" two years after he was in management, approximately five years before Plaintiff was fired. (Lewis, 165:10-166:4)

45. In June 2001, Darin Stevens learned that a driver, Bob Olson, who had less seniority than Stevens, had been granted vacation for the week of July 4, 2001. (Stevens, 223:13-25)

46. Darin Stevens called Plaintiff on June 19, 2001, to discuss with Plaintiff the way the vacation issue had been handled. (Stevens, 224:1-18)

47. Plaintiff "blew up" at Stevens, called him an agitator and threatened his job as a result of Stevens confronting Plaintiff about the vacation issue. (Exhibit 3); (Stevens, 224:23-227:7)

48 Plaintiff admits that he called Stevens an agitator. (Lewis, 94:10-12)

49. Plaintiff admits that he hung up on Stevens. (Lewis, 97:8-9)

50. Plaintiff testified that during the June 19, 2001 telephone call Stevens was "airing some conversation" over Bag 'N Save. Plaintiff admits that during the conversation there was discussion regarding whether Stevens would keep the Bag 'N Save account. (Lewis, 167:9-168:6)

51 Plaintiff claims that Stevens had been drinking prior to their telephone conversation. Stevens denies this. (Lewis, 97:1-2) (Stevens, 225:21-23).

52. Stevens was hurt by his conversation with Plaintiff because no one had ever talked to him like that before. (Stevens, 227:10-12)

53. Shortly after the June 19, 2001 conversation, Stevens went on vacation. After returning, Plaintiff told Stevens that he was going to remove Bag 'N Save from Stevens' route. (Stevens, 229:10-16)

54. Drivers are paid on a commission and salary basis. He believes that Plaintiff was retaliating against him by removing the Bag 'N Save account from his route. (Stevens, 221:7-9; 229:17-18)

55. Stevens was removed from the Bag 'N Save account in July 2001. (Stevens, 230:8-12) (Fredrickson, 364:18-365:6) (Daggerman, 640:12-16)

56. It was Plaintiff's job to restructure routes, but he denies taking Stevens off the Bag 'N Save account. (Lewis, 86:23-89:8)

57. Stevens took his notes of the June 19, 2001 telephone call Kim Quick, the local Teamsters' President, and complained that Plaintiff was retaliating against

him. (Stevens, 229:14-230:3) (Quick, 496:4-6; 500:5-13)

58. Quick immediately called Roberts and asked for a meeting regarding Stevens' complaint. (Quick 502:8-14) (Fredrickson, 350:15-351:2)

59. Roberts agreed to a meeting and on July 22, 2001, Fredrickson, Viale, Quick, and Stevens met to discuss Steven's complaint against Plaintiff. (Quick, 502:8-16) (Fredrickson, 351:3-6)

60. Fredrickson told Quick at the end of the meeting that Roberts would investigate Stevens' complaint and take appropriate corrective action. Quick was subsequently notified by Roberts that the situation was corrected and Plaintiff no longer worked for the company. (Fredrickson, 280:25-281:14) (Quick, 507:25-508:4)

61. When Viale took over as Omaha division manager, one of his goals was to rectify the poor relationship that had developed with the union. (Viale, 461:20-25)

62. It was well known at Roberts that the previous Omaha division manager did not get along well with the union. (Lewis, 173:4-10)

63. After the grievance meeting, Viale met with Plaintiff to discuss the issues regarding Steven's vacation and the Bag 'N Save account. (Lewis, 175:13-20) (Viale, 455:12-23)

64. Plaintiff told Viale that he knew he had violated the collective bargaining agreement, and that he did not care. (Viale, 455:12-19) (Exhibit 23)

65. Plaintiff also told Viale that Stevens was a problematic driver and that Bag 'N Save had complained about him. (Lewis, 100:19-23)

66. Plaintiff also said that Bergan Mercy Hospital had a complaint regarding

Stevens. (Lewis, 100:19-23)

67. At that time Viale did not ask Plaintiff who made the complaint at Bag 'N Save. (Viale, 608:12-14)

68. Viale and John Daggerman then went to Bag 'N Save and talked to the store manager and other employees, none of whom had complained about Stevens. Daggerman was the salesman responsible for the Bag 'N Save account. (Daggerman, 633:14-634:24) (Viale, 608:14-24)

69. The store manager, Robert Kimball, testified that he required all his employees to report to him any problems they may have with vendors. Kimball would then deal with the vendor personally. He testified that there were no complaints about Stevens. (Kimball, 531:6-17)

70. When Viale told Plaintiff that there were no complaints at Bag 'N Save, Plaintiff stated that he thought the person who had made the complaint had left the Omaha store. (Viale, 608:17-21)

71. Viale and Daggerman then returned to Bag 'N Save and determined that the previous manager was working at the company's store in York, Nebraska. (Viale, 464:2-24) (Exhibit 112)

72. Viale followed up with the Bag 'N Save manager in York and found out that he had no complaints or problems with Stevens. (Viale, 465: 5-13)

73. Lewis testified that the complaint about Stevens at Bag 'N Save was

made seven months prior to July 2001. (Lewis, 168:13-20)

74. Daggerman considers Stevens to be a good driver and is happy with the way Stevens services his accounts. (Daggerman, 635:1-3; 643:2-6)

75. Plaintiff's employment was terminated on August 1, 2001, because he did not follow the collective bargaining policy and subsequently lied about Stevens having performance problems. (Viale, 412:17-19)

76. Plaintiff thought that his duties were taken over by two foremen, Bob Olson and Chuck Knight, and that Knight subsequently went over to management, although Plaintiff was not sure whether he was given the title of wholesale manager. Plaintiff thought that Knight was 8 years younger than him, and believes that Knight moved to management because he was dying and wanted his wife to receive a larger death benefit. (Lewis, 136:13-137:12)

II. CONCLUSIONS OF LAW

A. Plaintiff's Disability Discrimination (ADA) Claims Fail

Based on the findings of fact at trial, Plaintiff cannot establish a claim for disability discrimination because he cannot establish that he is disabled. To establish a prima facie case under the Americans with Disabilities Act, Plaintiff must establish that (1) he is disabled within the meaning of the ADA; (2) he is qualified to perform the essential functions of his job with or without reasonable accommodation; and (3) he suffered an adverse employment action under circumstances that give rise to an

inference of unlawful discrimination based on disability. See Heisler v. Metropolitan Council, 339 F.3d 622, 626 (8th Cir. 2003).

The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). "Major life activities" include such functions as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(I). "Substantially limited" means "[u]nable to perform a major life activity that the average person in the general population can perform" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity . . .." 29 C.F.R. § 1630.2(j).

Plaintiff claims that his ability to speak was impaired by his 1992 surgery for throat cancer. Because Plaintiff's alleged impairment does not substantially limit this major life activity, and because no one regarded him as having a disability, Plaintiff cannot prevail on his ADA claim. Moreover, even if Plaintiff could establish that he was "disabled" within the meaning of the ADA, Defendant has established that it had a legitimate, non-discriminatory business reason for firing Plaintiff.

1. Plaintiff Does Not Have a Disability

In order to establish that he is an individual with a disability, Plaintiff must

prove that he has an impairment that substantially limits a major life activity. See Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 195 (2002). An impairment is substantially limiting if the individual is either unable to perform a major life activity or is significantly restricted in the ability to perform the activity in comparison to the general population. See Lusk v. Ryder Integrated Logistics, 238 F.3d 1237, 1240 (10th Cir. 2001).

The word "substantial" precludes impairments that interfere in only a minor way with an activity. See Albertsons, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999) (a "mere difference" does not amount to a signification restriction, and thus is not a substantial limitation). Determinations of substantial impairment must be performed on a case-by-case basis because symptoms vary widely from person to person. See Williams, 534 U.S. at 198. According to the Supreme Court, it is imperative to focus on the tasks central to daily life that an individual can perform in determining whether that individual is substantially limited in a major life activity. See id. at 201.

Plaintiff claims that his impairment is the quality of his voice. However, there was no evidence presented at trial that he was unable to speak, communicate with customers, co-workers or family members. At trial, Plaintiff testified that while he was employed at Roberts, he was continually on his cell phone, using it an average of 2200 minutes per month. He also testified that his voice never interfered with his job performance in anyway. Plaintiff provided no testimony that his voice affected his day-to-day life in any significant way. Plaintiff provided no evidence that his ability to speak, when compared to the average population, is substantially impaired.

Even though Plaintiff's voice may be different than before his throat surgery, Plaintiff is not substantially impaired. At most, the evidence at trial revealed that Plaintiff's tone of voice and or volume was affected by his 1992 surgery for throat cancer, but that his day-to-day life activities after his recovery were not so affected.

That is simply not enough. The tone of Plaintiff's voice does not render him incapable of performing a variety of tasks central to most people's daily lives and, thus, does not constitute a disability under the ADA. See Dorn v. Potter, 191 F. Supp. 2d 612, 622 (W.D. Pa. 2002) (employee's alleged speech impediment did not constitute a disability where employee's prior and subsequent job positions included extensive use of speech over unmodified telephone, employee used regular telephone at home, employee had no plans for treatment of impediment and employee was able to speak during deposition); Vailes v. Prince George's County, 2002 WL 1421117, *2 (4th Cir. Jul 2, 2002) (paralyzed vocal cord did not substantially limit major life activity of speaking despite evidence that employee experienced voice fatigue after prolonged use, where employee's treating physician stated that employee had "a good voice with clarity"); Doebele v. Sprint Corp., 157 F. Supp.2d 1191, 1209 (D.Kan. 2001) (employee not substantially limited in major life activity of speaking as she was able to carry on conversations with co-workers), rev'd on other grounds, 342 F.3d 1117 (10th Cir. 2003); Thalos v. Dillon Companies, Inc., 86 F. Supp. 2d 1079, 1085 (D.Colo. 2000) (fact that plaintiff sounded different from most people when talking

did not mean she was substantially limited in the major life activity of talking); Clement v. Executive Airlines, Inc., 213 F.3d 25, 32 (1st Cir. 2000) (evidence that the employee's tone of voice may have been affected was inadequate to support a conclusion that she was substantially limited in speaking); Crawley v. Runyon, 1998 WL 355529, *6 (E.D. Pa. Jun 30, 1998) (No. CIV. A. 96-6862) (not substantially limited in speaking where plaintiff's impairment caused moderate to severe hoarseness that at times affected both the quality and the volume of speech); Chastain v. USF&G Corp., 1996 WL 88409, *2 (W.D. Okla. Jan 3, 1996) (No. CIV-95-694-M) (not substantially limited in speaking where voice was described as "gruff" or "rude" and where plaintiff communicated with other by phone and in person).

The evidence at trial established that Plaintiff was and is able to perform all of the tasks central to daily life despite his slightly "gruff" tone of voice. Moreover, the managers who testified at trial all validated that Plaintiff had no problems whatsoever

performing his job duties. Therefore, Plaintiff is not actually "disabled" within the meaning of the ADA.

2. Plaintiff Was Not Regarded as Disabled

Likewise, Plaintiff did not prove that Roberts Dairy considered him disabled. In fact, the evidence at trial established just the opposite. Lewis admitted that no one at Roberts ever told him that his voice prevented him for performing his job. Roberts Dairy's executives, including Viale, Powell and Fredrickson, testified they did not

consider or regard Plaintiff as disabled pursuant to the ADA.

In order to establish that Roberts Dairy regarded him as disabled, Plaintiff has to prove that Roberts Dairy mistakenly believed he had a physical impairment that substantially limits a major life activity, not simply that it was aware of his impairment. See Sutton v. United Air Lines, 527 U.S. 471, 489 (1999). Roberts Dairy did not regard Plaintiff as having an impairment that substantially limited his ability to speak, a major life activity.

The evidence at trial revealed that Roberts Dairy was aware that Plaintiff had surgery for throat cancer in 1992 (while employed by Roberts Dairy) and has a "gruff" voice. The evidence also established that Roberts Dairy was supportive of Plaintiff's recovery and he continued to work at Roberts from 1992 through 2001, and in fact, was promoted into a management position in 1995. Aside from his problems with retaliating against and threatening subordinates, Roberts Dairy does not dispute that Plaintiff managed its wholesale department well. Evidence that Roberts Dairy was merely aware of Plaintiff's alleged impairment is insufficient to establish that Roberts Dairy regarded Plaintiff as disabled. See Kellogg v. Union Pac. R. Co., 233 F.3d 1083, 1089 (8th Cir. 2000) (stating that employer's knowledge of impairment without more does not amount to a disability); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1320 (8th Cir. 1996) (same).

Plaintiff's sole evidence that he was "regarded as impaired" stems from the

alleged conversation he had with John Viale during the day that they spent together in May 2001. According to Plaintiff's testimony, Viale was complimentary of Plaintiff in front of clients, but made a threatening comment about his health when they were alone in the car. Viale denies that he ever made any discriminatory or threatening comments of any kind to Plaintiff.

Lewis' version of the ride along with Viale is simply not credible. Viale was still in training to become Omaha division manager and had been informed that Plaintiff ran an efficient department. The trip was his first substantial interaction with Plaintiff, and Plaintiff even admits that Viale was complimentary of Plaintiff's relationships with customers. It makes no sense that Viale would then turn around and make discriminatory comments to Plaintiff.

3. Defendant's Decision Was Based On a Legitimate Business Reason

The evidence at trial established that Plaintiff, an at-will employee, was given a last chance agreement in March 2001, based primarily on his involvement in the Penoral Wiley charge of discrimination and subsequent lawsuit against Roberts Dairy. Roberts settled that lawsuit. As a result, Plaintiff was given the last chance agreement because Roberts had a good faith belief, based on the evidence obtained during investigation of the Wiley lawsuit, that Plaintiff had discriminated against Ms. Wiley. Powell and Fredrickson met with Plaintiff, and explained to him in detail the reasons that he was getting the last chance letter.

In July 2001, Roberts discovered that Plaintiff had engaged in additional violations of Company policy. After a driver, Darin Stevens, complained about

Plaintiff's threatening and intimidating behavior, the Union demanded an investigation. Based on the investigation, Roberts had a good faith belief that Plaintiff had violated the collective bargaining agreement with regard to Stevens' vacation time, and lied to Roberts about alleged complaints against Darin Stevens.

There was simply no credible evidence that Plaintiff's alleged disability motivated Roberts Dairy to terminate him or that Roberts Dairy's proffered explanation for Plaintiff's termination is unworthy of credence. Plaintiff was at all times an employee-at-will, and Roberts has the right to terminate an employee who is under a last chance agreement and who violated company policy. Accordingly, Roberts' business decision must be given deference and Plaintiff's disability discrimination claims must fail.

B. Plaintiff's Age Discrimination (ADEA) Claim Fails

In order to meet his prima facie burden of establishing age discrimination, Plaintiff must demonstrate that (1) he is a member of a protected class; (2) his job performance met legitimate expectations of the employer; (3) he suffered an adverse employment action by being discharged; and (4) he was replaced by a person sufficiently younger to permit an inference of age discrimination. See Simonson v. Trinity Regional Health System, 336 F.3d 706, 710 (8th Cir. 2003).

1. Plaintiff Was Not Discriminated Against Based On His Age

Plaintiff did not establish at trial that he was discriminated against due to his

age. At trial, the evidence showed that two out of three of the Roberts Dairy officials, John Viale and Jeff Powell, president of Roberts Dairy, who made the decision to terminate Plaintiff's employment are, like Plaintiff, members of the class protected by the ADEA and are not substantially younger than Plaintiff. See Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 688 n.3 (D. N.J. 1996) (fact that decisionmaker is a member of protected class weakens any possible inference of discrimination); Sumrell v. AmeriCold Logistics, L.L.C., 2002 WL 63082, *6 (D.Neb. Jan 3, 2002) (No. 8:00CV154) (same). In fact, the testimony at trial established that Roberts routinely hires and retains workers who are in the protected age category. It has not been shown that Plaintiff was replaced by a person who was sufficiently younger to give rise to an inference of age discrimination.

Evidence that Roberts fired another manager in January 2002 who was the same age as Plaintiff is not sufficient to prove that Plaintiff was terminated because of his age. That individual, David Stovie, testified that he heard a rumor and had the following conversation with Viale in May 2001: "I went to John's office, and I said, John, I heard there is a plan to fire Neil Lewis and myself. And John said, well, someone must have overheard what I said – or misunderstood what I said. He said, if I fire Neil Lewis, Dave Stovie will quit. You don't have to worry about him." (Stovie, 258:23-259:3) Stovie also testified that Viale stated during one of the manager meetings that "there is more than one way to get rid of somebody." (Stovie,

261:18-19) While Stovie's testimony challenges Viale's credibility, I ultimately conclude that Viale was telling the truth when he stated that neither Plaintiff's age nor the quality of Plaintiff's voice played any role whatsoever in his decision to terminate Plaintiff. (Viale, 615:21-616:3)

2. Defendant's Decision Was Based On a Legitimate Business Reason

See the discussion above with reference to Plaintiff's ADA claim.

III. CONCLUSION

Plaintiff's claim of age or disability discrimination stems from a conversation that he allegedly had with the Roberts Omaha Division manager, John Viale, during a daylong drive in late May 2001, when no one else was present. Plaintiff's version of that conversation is not credible. Roberts, on the other hand, presented credible evidence, corroborated by Kim Quick, the local Teamster's president, that Plaintiff, an at-will employee, threatened and intimidated a union driver because the driver challenged Plaintiff's violation of the collective bargaining agreement.

Accordingly,

IT IS ORDERED that:

1. Plaintiff's action is dismissed with prejudice; and

2. Judgment will be entered by separate document.

DATED: November 18, 2003. BY THE COURT:

s/ Richard G. Kopf

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NEIL LEWIS,	)	4:02CV3122
	)	
Plaintiff	)	
vs.	)	**JUDGMENT**
	)	
ROBERTS DAIRY COMPANY, INC.,	)	
	)	
Defendant.	)	

Pursuant to the court's previously filed **Memorandum and Orde**r, judgment is entered in favor of the defendant, Roberts Dairy Company, Inc., and against the plaintiff, Neil Lewis, providing that the plaintiff shall take nothing as against the defendant, and the plaintiff's action is dismissed with prejudice. Costs are taxed to the plaintiff, except that the cost of the transcript shall be shared equally by the parties, as previously stipulated (see filing 112).

DATED: November 18, 2003. BY THE COURT:
s/ Richard G. Kopf
United States District Judge

John Viale, Direct 404
1 Q. And that followed your conversation with Mr. Fredrickson
2 about firing people with disabilities and older people by
3 two days. That was July 27th. Is that right?
4 MR. DAHLK: Objection, Your Honor. I believe that
5 misstates the evidence.
6 THE COURT: That will be overruled. You may
7 answer.
8 THE WITNESS: It was two days after my conversation
9 with Tom Fredrickson.
10 Q. Okay. Placing on the monitor Exhibit 23. This is your
11 first draft of a termination letter; isn't it?
12 A. It was notes.
13 Q. Well, it says Mr. Lewis. Dear Mr. Lewis, doesn't it?
14 A. They were just notes.
15 Q. Do you always date your notes in the format of a letter
16 on Roberts Dairy letterhead?
17 A. Not always.
18 Q. July 29th, 2001. You wrote this document; didn't you?
19 A. Yes.
20 Q. On July 29th, 2001, you had a handwritten note from Neil
21 Lewis telling Darin Stevens he can have his vacation, didn't
22 you?
23 A. On July 29th, I did.
24 Q. Well, you actually had that July 20th; didn't you?
25 A. Yes.
John Viale, Direct 405
1 Q. Okay. So this, you make an effort when you write
2 letters to try to be truthful; don't you?
3 A. Yes.
4 Q. And so certainly you were accurate when you put the date
5 on this document?
6 A. They were just notes. I added to and subtracted from
7 those as it progressed, but I just never changed the date.
8 Q. Okay. Started July 29th, added some stuff a little
9 later?
10 A. And perhaps took some things out.
11 Q. There are certainly things in here that are not
12 accurate; isn't there?
13 A. There may be dates or the facts may not be exact.
14 Again, it was just a working document.
15 Q. Well, let's take a look at the vacation grievance.
16 Darin put in for vacation the week of July 4th. You denied
17 that request. Now, you actually told Mr. Lewis -- Withdraw

18 that. You told me in your deposition and referred to it in
19 this particular document that you went to Mr. Lewis, and you
20 said why did you deny Darin Stevens his vacation? And he
21 said because I wanted somebody with less seniority to have
22 it. I don't care if it violates the contract, I do it
23 anyway. That's what you said; isn't it?
24 A. That's true.
25 Q. Well, that is not at all consistent with Exhibit 24; is

1 it?
2 MS. McMAHON-BOIES: Your Honor, may I approach the
3 witness?
4 THE COURT: The witness, yeah, but make it clear to
5 the witness what you're doing because he sees something and
6 you're talking about something else.
7 BY MS. McMAHON-BOIES:
8 Q. And I'm going to refer to a different exhibit. Exhibit
9 24 is Neil Lewis's note of June 20th to Darin Stevens saying
10 he can have a vacation?
11 A. Yes.
12 Q. Now, you had that exhibit in your possession when you
13 started your Exhibit 23; didn't you?
14 A. Yes.
15 Q. Okay. You didn't produce that, though, with the
16 personnel file to plaintiff's counsel when that -- when
17 those documents were requested in November of 2001; did you?
18 THE COURT: What is the "that" in your question?
19 BY MS. McMAHON-BOIES:
20 Q. Thank you, Your Honor. I'll withdraw it and start
21 again. Mr. Viale, Exhibit 24 was not produced by the
22 company in response to the plaintiff's request for document
23 production back in November, 2000, was it; 2002?
24 A. I turned my files -- all of my files in. What was in, I
25 don't know. What was not in, I don't know.

1 Q. Certainly, that particular document refutes what you
2 wrote on July 29th, that Lewis said to you I gave it to
3 somebody else, and I violated the contract on purpose?
4 A. The complaint was lodged, the notes of the complaint on
5 this were lodged on 6-19, and there was a conversation
6 between Mr. Stevens and Mr. Lewis prior to that regarding
7 this issue.
8 Q. Mr. Viale, I'm talking about the conversation you
9 purportedly had with Mr. Lewis in which he said I violated
10 the union contract because I wanted a less senior person to

have it, and I just did it. I'm talking about that
conversation. When did that conversation take place?
A. On somewhere around July 20th.
Q. You had the meeting with Darin Stevens July 20th; didn't
you?
A. Yes.
Q. Is that a yes?
A. The meet with Darin Stevens was on June 19th.
Q. No, Mr. Viale, unless you're really --
A. I'm not understanding.
Q. The dates on Exhibit your July 29th letter. Don't you
say in here that Friday, June 20th, excuse me, Friday, July
20th, I met with Darin Stevens?
A. Yes.
Q. Okay. So you met with Darin Stevens on July 20th, and

that's the first time you heard he had a beef about his
vacation?
A. That is true.
Q. And you say in that document, Exhibit 23, that when I
asked you about why you denied him his vacation, you said
I'm ignoring the union contract to give it to somebody else;
don't you?
A. Yes.
Q. That's directly contrary to the note you had in
possession but did not produce until last week where Mr.
Lewis says you can have your vacation. Just pick the date.
Let me know?
A. Mr. Lewis did deny his request for vacation on July 4th.
Q. That's not what Mr. Lewis told you; is it?
A. Yes.
Q. Certainly, Mr. Lewis put it in writing the guy could
have it off; didn't he?
A. After Darin Stevens wrote the note, yes.
Q. Well, Mr. Lewis actually told you that even as far back
as December, what he does is take requests and let everybody
know if there is a particularly crowded week, they might
want to reschedule because they might get denied. That's
how he does business; isn't it?
A. I'm not aware of that.
Q. You didn't have anything to do with scheduling drivers'

vacations; did you?
A. No.
Q. You want your drivers scheduled so that there is

coverage on all routes; don't you?
A. I want them scheduled according to our bargaining agreement with the union.
Q. Absolutely, and the way that's done is, they all put in their requests, and they are juggled around, and ultimately, the most senior person who still has their name for a given week is going to get it; aren't they?
A. The most senior person gets his first choice and so on down the line.
Q. And Mr. Lewis -- and Mr. Stevens hadn't stuck with his first choice, had he? He changed his mind?
A. Not that I'm aware of.
Q. Well, he said it -- Withdraw that.
MS. McMAHON-BOIES: May I approach the courtroom deputy for some exhibits?
THE COURT: Yes.
BY MS. McMAHON-BOIES:
Q. I'm placing before you Exhibit 3. What is that document, Mr. Viale?
A. These are handwritten notes by Darin Stevens.
Q. The format that you actually got those notes from Darin Stevens included Exhibit 24 attached to it; didn't it?

A. Which is Exhibit 24, this one?
Q. Look at the exhibit stickers. Exhibit 24 is in front of you?
A. Not that I recall.
Q. Let's look further in Exhibit 23. You go on to say you told Tom Fredrickson they complained about leakers, rotating codes and picking up product. Those were things that were regularly being complained about when it came to Darin Stevens; weren't they?
A. All drivers.
Q. Oh, you think all drivers have as many complaints as Darin Stevens?
A. No. All drivers have complaints relative to these issues.
Q. So as soon as you knew that Lewis was telling you about the complaints against Stevens, you knew that was true because that happens with drivers?
A. Yes.
Q. Okay. After you got the letter on July 20th, you went to Mr. Lewis. When did you go to him?
A. I think either that afternoon or the next day, within a day or two.

23 Q. And what you told him was that Stevens was complaining
24 about his vacation and you asked him how Stevens is as an
25 employee?

1 A. We dealt with the vacation issue first.
2 Q. And then you asked him, how is Stevens as an employee?
3 A. As I recall, Neil said I have had a lot of complaints
4 from the Bag 'N Save on 50th and Grover, and that there were
5 performance issues relative to Darin's attitude, possibly
6 his language, things of that sort.
7 Q. Did you look in his personnel file and see if he had
8 problems with attitude?
9 A. I did not.
10 Q. Those complaints are in there; aren't they?
11 A. I can't answer that.
12 Q. And that would have been an easy way to verify whether
13 Lewis had -- Withdraw that. That would have been an easy
14 way to verify whether Stevens had those kinds of issues
15 going on?
16 A. Yes.
17 Q. You chose not to do that?
18 A. Yes.
19 Q. Instead, you started a termination letter, July 29th,
20 and then you actually fired him on July 30th; didn't you?
21 A. No. August 1st.
22 Q. Well, do you remember telling me in your deposition it
23 was July 30th?
24 A. Possibly, but the letter was dated August 1st.
25 Q. Well, the first letter was dated July 29th; wasn't it?

1 A. It wasn't a letter; it was notes.
2 MS. McMAHON-BOIES: May I approach, Your Honor?
3 THE COURT: You may.
4 BY MS. McMAHON-BOIES:
5 Q. Okay. So these notes that you put on Roberts Dairy
6 letterhead and put an address to somebody, put a date on it
7 and started as Dear Mr. Lewis and ended with Sincerely
8 wasn't a letter?
9 A. No.
10 Q. And you started this one, you started your notes about
11 termination, and it clearly says you're terminated; didn't
12 it?
13 A. The notes, yes.
14 Q. So when you started your notes, I'm terminating you on
15 July 29th, it was because he lied that Bag 'N Save had

16 complaints when they don't?
17 A. It was for not following our bargaining policy with the
18 union and subsequently lying about performance issues with a
19 driver.
20 Q. When you did the final termination letter, you took out
21 all references to not complying with the bargaining
22 agreement; didn't you?
23 A. Yes.
24 Q. Because you had a letter from Mr. Stevens that would
25 clearly show that Mr. Lewis told him he could have the

1 vacation?
2 A. This was after Darin Stevens had already made other
3 arrangements for vacation, but yes, he did.
4 Q. On July 30th you get a note from Bag 'N Save saying,
5 yeah, he's got short codes, and he doesn't always take
6 returns. That would certainly not indicate Bag 'N Save
7 didn't have any problems with Darin Stevens; did it?
8 A. It would indicate they have no performance issues.
9 Q. But short codes are an issue for the drivers; aren't
10 they?
11 A. Short codes are generally an issue for the manufacturing
12 facility, not the driver. The driver basically puts on his
13 truck what is pulled by the cooler, plus he may have some
14 products on his truck from the day before.
15 Q. Mr. Viale, it is the driver's responsibility not to
16 deliver short codes. If the warehouse brings out short
17 codes, the driver is not supposed to take it off the dock;
18 isn't that right?
19 A. The driver may not always be aware of it. If we have a
20 misrotation in the cooler, it's very easy to get mixed codes
21 on a load, and that's the cooler responsibility. The driver
22 is to check it, but certainly it's the cooler's
23 responsibility. It wouldn't always be caught by the driver.
24 Q. So Darin Stevens may well have just decided not to check
25 the codes on this particular occasion?

1 A. Darin would deliver the product that was put on his
2 truck.
3 Q. He's supposed to check it and make sure the codes aren't
4 short, though; isn't he?
5 A. But if the cooler was short and those were the only
6 products they had in the cooler to deliver on a given item,
7 Darin would probably deliver them as would all of our
8 driver's.

9 Q. Would why would he get a written warning in his file for
10 short codes?
11 A. I don't know.
12 Q. Expired products is a real concern for Roberts; aren't
13 they?
14 A. Short codes and expired products, products considered to
15 have short codes when it still has at least ten days code on
16 it before it expires.
17 Q. The problem with short code is by the time a customer
18 gets it, it's going to be expired in a very short time;
19 isn't it?
20 A. Well, if a customer buys it within nine days, I mean,
21 that's all relative to that whether that is short or not.
22 Most of our accounts have policies, or a lot of our accounts
23 have policies relative to codes. And a lot of the stores
24 have a different policy. We put 17 days on our milk. Some
25 people may think it's short coded after 13 days. Some

TRANSCRIPT EXCERPTS FROM DARIN STEVENS –ADDENDUM P. 28

8 MS. McMAHON-BOIES: Your Honor, may I approach the
9 witness?
10 THE COURT: Yes.
11 MS. McMAHON-BOIES: Does the Court need a copy of
12 this deposition?
13 THE COURT: I don't as long as we aren't going to
14 spend a lot of time with the deposition.
15 MR. DAHLK: Your Honor, I have an extra copy if the
16 Court --
17 THE COURT: Sure.
18 MR. DAHLK: May I approach?
19 THE COURT: Thank you.
20 MS. McMAHON-BOIES: May I approach the witness,
21 Your Honor?
22 THE COURT: You may.
23 BY MS. McMAHON-BOIES:
24 Q. Referring you to your deposition, do you recall having
25 your deposition taken February 10th of 2003?

1 A. Yes.
2 Q. On page 52, line 8, I asked you, how often do you drink?
3 Do you recall your response, oh, a couple of beers a night?
4 A. Yes.
5 Q. And, in fact, you stated to me on that date that you had

22 beers in the weekend prior to when we sat down and did
the deposition; didn't you?
A. Yes.
Q. You don't remember much about the conversation you had
with Neil Lewis back in December of 2000 about the July
vacation time; do you?
A. I remember him saying I can't have the 4th of July week
for a vacation.
Q. Do you remember telling me in your deposition you don't
really recall that conversation?
A. I remember some of it.
Q. You don't really recall much of the June 19th, 2001,
conversation with Neil Lewis except what you wrote down;
isn't that right?
A. Yes.
Q. And the reason you wrote it down is you wanted to
remember?
A. Yes.
Q. You didn't write anything down in the December, 2000,
conversation about July 4th; did you?

A. No.
MS. McMAHON-BOIES: May I approach the witness,
Your Honor?
THE COURT: You may.
BY MS. McMAHON-BOIES:
Q. Placing before you Exhibit 3, is that the notes of your
conversation of June 19th, 2001?
A. Yes.
Q. When did you write that document?
A. Approximately 6:00 p.m. that night.
Q. And Exhibit 24, you attached to Exhibit 3 when you
talked to Kim Quick, didn't you?
A. Exhibit 24?
Q. I'm sorry. Placing before you Exhibit 24, is that a
memo from Neil Lewis?
A. The next day.
Q. You got that from Neil Lewis the next day?
A. Yes.
Q. And you attached it to Exhibit 3 and turned it in to Kim
Quick?
A. Yes.
Q. Now, nothing -- Withdraw that. You attempted to be
pretty specific and all-encompassing in all those notes you
made of that conversation; didn't you?

25 A. Yes.

1 Q. There is nothing in that conversation that referred in
2 any way to a Bag 'N Save route; was there?
3 A. No.
4 Q. In that note, you admitted that Neil Lewis comes to you
5 because of customer complaints; didn't you?
6 A. Not so much complaints.
7 MS. McMAHON-BOIES: May I approach the witness,
8 Your Honor?
9 THE COURT: You may.
10 BY MS. McMAHON-BOIES:
11 Q. Mr. Stevens, you can see this on the monitor next to you
12 and allow the jury to see it as well. Midway, is this your
13 handwriting, sir?
14 A. Yes.
15 Q. You say, he also said he covers my ass for all the
16 accounts that call in on me. Do you see that?
17 A. Yes.
18 Q. Well, I don't know how many accounts really call in on
19 me, but any time somebody does, Neil Lewis is the first
20 person to call my cell phone. Is that what you said?
21 A. Yes.
22 Q. He calls your cell phone because people are calling
23 complaining; aren't they?
24 A. Not so much complaining.
25 Q. What is it he's helping you out with when these

1 customers call?
2 A. Customers calling needing more product, running out of
3 product.
4 Q. And if you deliver shorts, the customer runs out of
5 products; isn't that right?
6 A. Repeat that.
7 Q. Yeah. If your delivery is short, the customer will run
8 out of product?
9 A. Yes.
10 Q. At times, your customers have complained about you not
11 picking up leakers; haven't they?
12 A. Yes.
13 Q. They have complained about having shorts, not having
14 enough products?
15 A. Yes.
16 Q. They have complained about outdated codes on the
17 products delivered?

18 A. Yes.
19 Q. You think at least four times a year you're getting
20 complaints like that?
21 A. Around there.
22 Q. Failing to rotate milk is one of the things that your
23 supervisor gets complaints about about you?
24 A. Not that I was aware of.
25 MS. McMAHON-BOIES: May I approach the witness,

1 Your Honor?
2 THE COURT: You may.
3 BY MS. McMAHON-BOIES:
4 Q. I refer you to your deposition, page 22, line 11. Have
5 you ever gotten a call to the supervisor that you don't
6 rotate milk? Answer, oh, I might have on one occasion, two
7 occasions. Do you recall saying that?
8 A. Yes.
9 Q. When that happens, Neil Lewis calls you and you attempt
10 to work it out; isn't that right?
11 A. Yes.
12 Q. And sometimes he'll take a load of product because there
13 has been a complaint on your route?
14 A. Maybe because he runs out of product, we have to run a
15 special is what it's called.
16 Q. Mr. Lewis goes and does it; doesn't he?
17 A. We have a guy that does it specifically.
18 Q. Mr. Lewis has also done it; hasn't he?
19 A. Not that I know of.
20 Q. Sometimes you have had customers that are very angry
21 about your failure to follow through with your job; haven't
22 you?
23 A. Not that I know of.
24 Q. Do you remember getting your job threatened because of
25 that?

1 A. No, I don't.
2 MS. McMAHON-BOIES: May I approach the witness,
3 Your Honor?
4 THE COURT: Yes, you may.
5 BY MS. McMAHON-BOIES:
6 Q. Mr. Lewis, I'm putting on the screen Exhibit 1. At this
7 time, Your Honor, I would offer Exhibit 1; also offer
8 Exhibit 2 and 6?
9 MS. BOCK: We object to all three for relevancy,
10 Your Honor, and hearsay.

11 THE COURT: Well, let me see the document. Let me
12 see counsel at the bench, and let me see the documents.
13 (Side bar)
14 THE COURT: Well, these aren't offered to prove the
15 truth of the matter asserted. I assume they are offered
16 just as proof that there was a complaint. Whether the
17 complaint is true or not, as I understand it; is that right?
18 MS. BOCK: Yes. We'll also object as to
19 prejudicial and the date being in the 1990 time frame.
20 THE COURT: Well, one is 1990 and one is 1991 and
21 one is 1995. You're saying --
22 MS. BOCK: We are saying the collective bargaining
23 agreement doesn't allow the company to consider complaints
24 on employees that are past. We are just saying they are
25 prejudicial, Your Honor.

1 THE COURT: That will be overruled.
2 MS. BOCK: Okay.
3 (End of side bar)
4 THE COURT: The objection is overruled. 1, 2 and 6
5 are received.
6 BY MS. McMAHON-BOIES:
7 Q. Referring you to Exhibit 1, Mr. Stevens, this was a
8 warning letter signed by you; wasn't it?
9 A. Yes.

18 of your duties; isn't it?
19 A. Yes.
20 Q. Taking leakers back is one of your duties?
21 A. Yes.
22 Q. Taking returns is part of your job?
23 A. Yes.
24 Q. The Bag 'N Save account was not removed from your route
25 until after Neil Lewis was no longer employed; isn't that

1 right?
2 A. No.
3 Q. Do you recall in your deposition when you told me it was
4 removed by the successor?
5 A. The successor?
6 Q. Well, do you recall telling me that it was removed after
7 he left?
8 A. I don't recall that.
9 MS. McMAHON-BOIES: May I approach the witness,

10 Your Honor?
11 THE COURT: Yes.
12 BY MS. McMAHON-BOIES:
13 Q. Page 48 of your deposition, line 22, did you lose Bag 'N
14 Save as a customer? Answer: Yes. They restructured.
15 Question: The routes did get changed; didn't they? Answer:
16 Yes. All routes changed, didn't they? Answer: Yeah. When
17 did that occur? About when school started, late August, mid
18 August. Do you recall that testimony?
19 A. Yes.
20 Q. That was 2001?
21 A. Yes.
22 Q. And Neil Lewis is gone by then; wasn't he?
23 A. I believe so.
24 Q. You never filed a grievance because that route changed
25 on you; did you?

1 A. Yes.
2 Q. You did file a grievance on that?
3 A. I'm sorry. No.
4 THE COURT: Counsel, give me a sense of how much
5 longer you'll be with this witness.
6 MS. McMAHON-BOIES: Not much, Your Honor.
7 BY MS. McMAHON-BOIES:
8 Q. You actually had a better working relationship with Neil
9 Lewis than you did Mr. Smith, his predecessor; didn't you?
10 A. Yes.
11 Q. Lewis was the one that if you were having issues would
12 come to you, talk to you and work it through; wasn't he?
13 A. Yes.
14 Q. Mr. Smith was one that would write you up and go after
15 you; wasn't he?
16 A. Yes.
17 Q. It is, though, Mr. Lewis's job to scrutinize the
18 accounts and make sure everybody is happy; isn't it?
19 A. I don't know what his job description was.
20 Q. He was your supervisor?
21 A. Yeah.
22 Q. What will happen if a customer is unhappy with a driver?
23 A. They'll try and work with them, and if not, they'll
24 change them, put them on a different route.
25 Q. Do you remember what Mr. Viale told to you when you

1 brought this complaint forward?
2 A. Yes.

Q. He thanked you; didn't he?
A. I can't recall exactly.
Q. He said thank you for bringing this to my attention;
didn't he?
A. Oh, yes.
Q. You never did file a grievance in this matter; did you?
A. No, I didn't.
Q. You could have taken that vacation on July 4th, couldn't
you?
A. Yes.
Q. You made other plans and were satisfied and did not do
that?
A. I had already made other plans, yes.
Q. Are you a member of the Teamsters, Mr. Stevens?
A. Yes.
Q. You are just coming off a strike?
A. Yes.
Q. Didn't strike when Mr. Lewis was there; did you?
A. No.
Q. Never filed a grievance under Mr. Lewis; did you?
A. No.
MS. McMAHON-BOIES: I don't have anything else,
Your Honor.

THE COURT: Let me inquire of the defendant how
long you will be with this witness.
MS. BOCK: Probably fairly decent amount of time,
Your Honor.
THE COURT: Shall we take our noon break then?